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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

NATIONAL TREASURY EMPLOYEES UNION and AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO, AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 3407, and PATRICK A. WEED,

Petitioners,

v.

K. WILLIAM O'CONNOR, SPECIAL COUNSEL, MERIT SYSTEMS PROTECTION BOARD

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTION PRESENTED

Whether petitioners' challenge to the constitutionality of an advisory opinion issued by the prosecutor of Hatch Act violations presented a concrete controversy ripe for judicial review where (1) the opinion declared that federal employees could not, consistent with the Act, participate in specific voter registration drives sponsored by the union-petitioners; and (2) the opinion prompted federal employees to abort their registration drives because of their reasonable fear that, if they disregarded the Special Counsel's advice, they would face Hatch Act prosecution.

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OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a) is reported at 747 F.2d 748. The opinion of the district court, vacated by the court of appeals' decision, was reported at 589 F. Supp. 1551 (App., *infra*, 33a).

JURISDICTION

The judgment of the court of appeals was entered on November 2, 1984. A motion for rehearing, with a suggestion for rehearing *en banc*, was denied on February 8, 1985. On April 29, 1985, the Chief Justice signed an order extending the time for filing this petition for certiorari to and including June 10, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The pertinent statutory provisions at issue are 5 U.S.C. 1206, 7324(a)(2), and 7325 (App., *infra*, 69a).

STATEMENT

1. Petitioners may be identified as follows. The National Treasury Employees Union (NTEU) is a labor organization which represents approximately 120,000 federal employee. The American Federation of Government Employees, AFL-CIO (AFGE) is also a labor organization and represents approximately 700,000 federal employees. AFGE Local 3407 is the exclusive bargaining representative for various employees at the Defense Mapping Agency in Brookmont, Maryland. Patrick A. Weed, a federal employee, is the president of AFGE Local 3407.

2. The Special Counsel is charged by statute with the responsibility of investigating and prosecuting violations of section 9(a) of the Hatch Act, 5 U.S.C. 7324(a)(2), before the U.S. Merit Systems Protection Board (MSPB). 5 U.S.C. 1206(e)(1)(A)-(B), (g)(1). The Hatch Act prohibits federal employees from taking "an active part in political management or political campaigns." 5 U.S.C. 7324(a)(2). Employees found guilty of engaging in proscribed activities may be suspended or dismissed. 5 U.S.C. 7325. In addition to his enforcement function, the Special Counsel is statutorily authorized to issue advisory opinions concerning the Hatch Act. 5 U.S.C. 1206(*l*).

3. The petitioners filed suit against the Special Counsel on March 27, 1984. The jurisdiction of the district court was invoked under 28 U.S.C. 1331. The petitioners initially challenged a March 2, 1984, advisory opinion issued by the Office of the Special Counsel (OSC), and addressed to the National Federation of Federal Employees (NFFE), which declared that federal employee union members could not, consistent with the Hatch Act, engage in union-sponsored voter registration drives if

the union had endorsed candidates for office. (See NTEU Joint Appendix (J.A.) 6 and AFGE Joint Appendix (J.A.) 5 filed in the court of appeals.) Both NTEU and AFGE had endorsed candidates. Chapters and locals of both unions had specific plans to conduct, under the auspices of NTEU and AFGE respectively, voter registration drives during the primary and general election campaigns of 1984. In their complaints, the unions took issue with the conclusion of the OSC that a union's endorsement of a candidate transformed any voter registration drive it sponsored into a partisan endeavor prohibited by the Hatch Act. They maintained the OSC's letter would thwart their non-partisan registration efforts, and that it contravened the Hatch Act and violated the First Amendment rights of the unions and their members (NTEU J.A. 10, AFGE J.A. 9). The unions asserted that their planned registration drives would have to be aborted as a result of the OSC's opinion; to have the drives go forward would subject their members to the risk of prosecution for Hatch Act violations (NTEU J.A. 5, AFGE J.A. 7).

4. In their motions for temporary restraining orders, the unions described the particular and rapidly approaching registration activities they had planned for the primary season (NTEU J.A. 14, 18, 19, 37, 49, 50; AFGE J.A. 17, 19, 22, 23). Denying the unions' motions, the district court instructed NTEU and AFGE to seek their own advisory opinion from the Special Counsel regarding the voter registration drives they wished to stage (App., *infra*, 5a). Accordingly, on April 2, 1984, NTEU and AFGE submitted a request letter to the Special Counsel which stated, in pertinent part:

> [NTEU] and [AFGE] have each endorsed a candidate for the presidency in 1984. Both unions, as has been our practice in the past, are now engaged, through our locals and chapters, in non-partisan voter registration activity at worksites across the

> country. More specifically, at such registration activities, no attempt is made to solicit registrants on the basis of political party or candidate preference.

(App., *infra*, 6a). The unions further explained that they essentially sought to determine whether the conclusion declared in the OSC letter to NFFE applied to their planned registration activities; namely, whether the Special Counsel considered their drives necessarily "partisan" in light of the unions' endorsements of candidates for office (NTEU J.A. 35). The unions' letter noted the pending litigation challenging the March 2, 1984, OSC letter (*Id.*).

5. On April 6, 1984, the unions received a seven page response to their inquiry which was personally issued by K. William O'Connor, the Special Counsel (App., *infra*, 59a). Noting that the unions' request contained only a brief description of their planned registration activity, the Special Counsel stated that, in order to give a thorough response, he had considered materials filed in connection with the unions' law suit, "as well as other material in our files." (App., *infra*, 60a).

6. The Special Counsel's opinion at the outset described the history of the Hatch Act, discussed generally applicable judicial and administrative precedent, and listed several factors relevant to determining whether a particular voter registration drive violated the Hatch Act (App., *infra*, 60a-64a).

Turning to the specific drives sponsored by AFGE and NTEU, the Special Counsel declared:

> Where, as here, the unions have endorsed partisan candidates, and where, as here, the unions have issued public statements and communications to their membership emphasizing the importance of voter registration in advancing the campaigns of candidates which the unions support, the ineluctable conclusion must be that those voter registration drives sponsored or

> conducted by the unions are, in fact, partisan. Accordingly, we must advise you that participation by federal employees in your unions' voter registration drives is prohibited political activity within the definition of the Hatch Act.

(App., *infra*, 66a) AFGE and NTEU amended their complaints, focusing their challenge on the April 6, 1984, advisory ruling (App., *infra*, 8a).

7. The district court entered summary judgment for the government on June 28, 1984, after the primary elections in most states. The court first found justiciable the controversy presented. The court described the Special Counsel's opinion as "an authoritative statement" concerning the "specific" registration drives planned by the unions which had been issued "pursuant to a statutory grant of power, by the very person charged with the enforcement process . . ." of the Hatch Act (App., *infra*, 48a-49a). The court concluded that the Special Counsel's opinion created "an onerous legal uncertainty" and found that it was "tantamount to a threat of enforcement." (App., *infra*, 48a). Noting both the severe penalties for Hatch Act violations and the fact that the Special Counsel's opinion had "the effect of deterring the exercise of constitutional rights . . ." the court held that the unions were "entitled to seek review of [the advice] without further delay." (App., *infra*, 49a). However, on the merits, the court found the Special Counsel's opinion consistent with the Hatch Act and the Constitution (App., *infra*, 57a).

8. On November 2, 1984, four days before the general election, a divided panel of the court of appeals vacated the district court's decision, holding that the unions' complaints failed "to present concrete claims ripe . . ." for adjudication (App., *infra*, 4a). The majority's opinion spoke of the non-binding effect of the Special Counsel's advice and observed that Congress intended the MSPB, and not the Special Counsel, to speak the final admin-

istrative word on the meaning of the Hatch Act (App., *infra*, 12a). The majority further asserted that the unions had not presented a "fact-particular" case, that "no crystallized controversy" existed (App., *infra*, 16a-17a).

The dissent took issue with the majority's ripeness determination, stating that "the justiciability of this case rests firmly on the threat of enforcement implicit in the Special Counsel's advisory opinion" (App., *infra*, 28a). Noting the majority's "peculiar insensitivity to the first amendment interests of federal employees," the dissent stressed the hardship to petitioners that resulted from denying them judicial review (App., *infra*, 25a). The dissent observed that the practical consequences of the majority's decision were that "unless federal workers are willing to put their jobs on the line . . ." the Special Counsel's opinion would remain the law and "employees throughout the nation will effectively be barred from participation in neutrally conducted voter registration drives sponsored by AFGE or NTEU" (App., *infra*, 23a).

REASONS FOR GRANTING THE PETITION

This case presents an issue that is critically important for two reasons. First, the ruling of the divided court of appeals is fundamentally at odds with numerous decisions of this Court because it failed to discern that the Special Counsel's advisory opinion carried a serious threat of Hatch Act enforcement and hence was properly subject to judicial challenge. Second, the appeals court's decision virtually ignored the compelling First Amendment interests at stake and seemed blind to the enormous hardship denial of review caused.

As a result of the withholding of judicial review, the unions' federal employee members find themselves caught on the horns of a dilemma. They must choose between the most burdensome type of compliance with the Special Counsel's advice—surrendering their right to conduct

voter registration drives—and risking extreme penalties should they ignore it, including the loss of their jobs. These alternatives present an impossible Hobson's choice. Here, the federal workers "chose" to abort their registration activity throughout one entire election year cycle. The court of appeals decision guarantees that federal workers across the nation are now effectively barred from exercising their vital First Amendment right to participate in neutrally conducted voter registration drives sponsored by NTEU or AFGE or any other union which has endorsed a candidate for office. Unless this Court grants review, the legality of the Special Counsel's opinion will not, as a practical matter, ever be in a reviewable posture.

1. This Court has instructed that a case is ripe for judicial consideration when "there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." *Maryland Casualty Co.* v. *Pacific Coal and Oil Co.*, 312 U.S. 270, 273 (1941).

Of particular importance here, the Court has repeatedly held that justiciable controversies exist when individuals are confronted with genuine threats of enforcement of statutes or other government action of questionable legality. This Court and others have been especially flexible in treating such threats as justiciable when the exercise of fundamental First Amendment rights is jeopardized.[1] Hence, in *Steffel* v. *Thompson*, 415 U.S. 452, 459 (1974), the Court held that a leafletter faced with a serious threat of criminal charges need not "first expose himself to

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[1] The courts have often recognized that suits complaining of an abridgement of First Amendment rights are "more readily justiciable than comparable suits not so affected with a First Amendment interest." *National Student Association* v. *Hershey*, 412 F.2d 1103, 1113 (D.C. Cir. 1969). See also *Planned Parenthood Ass'n* v. *Kempiners*, 700 F.2d 1115 (7th Cir. 1983); *Int'l Society for Krishna Consciousness* v. *Eaves*, 601 F.2d 809 (5th Cir. 1979).

actual arrest or prosecution to be entitled to challenge a statute he claims deters the exercise of his constitutional rights." The Court more recently explained that where a party states "an intention to engage in a course of conduct arguably affected with a constitutional interest" that is apparently prohibited by a statute, and there "exists a credible threat of prosecution thereunder, he 'should not be required to await and undergo a criminal prosecution as the sole means of seeking relief.'" *Babbitt* v. *United Farm Workers*, 442 U.S. 289, 298 (1979), quoting *Doe* v. *Bolton*, 410 U.S. 179, 188 (1973). In *Int'l Society for Krishna Consciousness* v. *Eaves*, 601 F.2d 809, 821 (5th Cir. 1979), the court held that a party seeking to challenge a threat of enforcement "need cross only a low threshold," given this Court's instruction that such threats are justiciable where they are "credible," *Babbitt* v. *UFW*, 442 U.S. at 298, and not "chimerical," *Poe* v. *Ullman*, 367 U.S. 497, 508 (1961) (plurality opinion), or "imaginary or speculative," *Younger* v. *Harris*, 401 U.S. 37, 42 (1971).[2]

The majority's decision below paid lip service to these principles but failed to apply them faithfully. Indeed, rather than permitting petitioners to pass the "low threshold" defined by this Court's teachings, the majority erected an insurmountable roadblock that insured the halting of First Amendment expression. Taking an approach fundamentally at variance with the pragmatic tack demonstrated by this Court's "threat of enforcement" decisions, the majority suggested that only a direct, explicit threat would create a justiciable controversy (App., *infra*, 18a).

The Special Counsel flatly opined that an employee's participation in the unions' planned drives "is prohibited political activity" under the Hatch Act (App., *infra*, 66a). The majority disagreed with the district court's

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[2] The courts have recognized that this principle extends to threats of sanctions other than criminal prosecution. See *e.g.*, *Kaplan* v. *Hess*, 694 F.2d 847, 851 (D.C. Cir. 1982).

finding that this advice was "tantamount to a threat of enforcement" (App., *infra*, 48a). The majority's determination—which the dissent found "remarkable" and "hard to fathom" (App., *infra*, 23a, 25a)—is unpersuasive for several reasons. First, the court's decision is inexplicably oblivious to the clout wielded by the Special Counsel. The court's analysis treats the Special Counsel as if he were a mere mid-level government official instead of recognizing just what he is: the prosecutor of violations of the Hatch Act—a statute which carries extremely severe penalties for federal workers, including dismissal. Stated simply, when the prosecutor of the Hatch Act speaks, federal employees listen—and they do so very carefully.[3]

Second, the majority's almost cavalier dismissal of the unions' contentions that the Special Counsel's opinion carried a very real threat of prosecution is especially "hard to fathom" given the categorical language he used in characterizing the voter registration drives planned by the unions. The Special Counsel declared:

> Where, as here, the unions have endorsed partisan candidates, and where, as here, the unions have issued public statements and communications to their membership emphasizing the importance of voter registration in advancing the campaigns of candidates which the unions support, *the ineluctable conclusion must be* that those voter registration drives sponsored or conducted by the unions are, in fact, partisan. Accordingly, we must advise you that participation by federal employees in your unions' voter registration drives is prohibited political activity within the definition of the Hatch Act.

(App., *infra*, 66a) (Emphasis added)

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[3] The Court's decisions recognizing the justiciability of actions involving threats of prosecution plainly show the unconvincing nature of Judge Edwards' view that the unions' action here is nonjusticiable because brought against a prosecutorial official (App., *infra*, 21a).

As the dissent so aptly put it, "an advisory opinion of such specificity, issued by the official statutorily charged with initiating punitive proceedings under the Hatch Act, is clearly tantamount to a threat of enforcement." (App., *infra*, 25a).

This Court's decision in *Babbitt* v. *United Farm Workers* underscores the grave error of the court of appeals' determination. In that case this Court found ripe for review the union's challenge of several sections of the Arizona Agricultural Employment Relations Act including one that regulated consumer publicity. Among other things, the statute required that such publicity not be dishonest, untruthful and deceptive. The union noted that it had engaged in publicity campaigns in the past, and alleged that erroneous statements in their future efforts were inevitable. The Court held that the union's future plans—even in the absence of a specific threat of enforcement—created a justiciable matter. The Court observed that the state had "not disavowed any intention of invoking" the statute's penalties and concluded that hence the union was "not without some reason in fearing prosecution . . ." 442 U.S. at 302. The Court similarly found justiciable a statutory provision that restricted consumer appeals to products over which the union had a primary dispute. The union claimed the section impaired protected speech. The Court found their claim justiciable on the basis of the union's past consumer appeals "now arguably prohibited" by the statute and the union's allegation of its intention to continue this activity. 442 U.S. at 303. In short, *Babbitt* v. *United Farm Workers* teaches that a reasonable fear of prosecution of even an ambiguous statute constitutes a justiciable controversy.[4]

Clearly, this standard has been easily satisfied in the instant case. Here, it is undisputed that the unions'

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[4] See 13A Wright & Miller, *Federal Practice and Procedure*, Section 3532.5, at 181 (2d. ed. 1984).

members aborted all of their planned registration activities in the wake of the Special Counsel's advice. They declined to subject themselves to the clear risk of Hatch Act prosecution by going forward with the drives. Given the definitive manner in which the Special Counsel characterized the illegality of the unions' registration drives, the unions' members can hardly be said to be unreasonable in their fear of prosecution, particularly when defiance of the Special Counsel posed a threat to their livelihoods.[5]

The majority's attempt to portray the Special Counsel's declaration as a piece of non-threatening advice is singularly unpersuasive. The majority's cursory discussion of the matter makes two points. First, it maintained that no genuine enforcement threat existed given the "fact-thin" nature of the unions' case (App., *infra*, 18a). But clearly there was nothing hypothetical or indefinite about the controversy presented. The unions' request letter to the Special Counsel, while concise, described the pertinent characteristics of the specific registration drives the unions sought to conduct through their locals. The particulars concerning these drives were fully laid out in the affidavits submitted by the unions

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[5] The reasonableness of the fear of prosecution is especially evident given the fact that the Special Counsel never "disavowed any intention" of prosecuting the unions' members should they proceed to participate in the drives the Special Counsel found illegal. *Babbitt* v. *UFW*, 442 U.S. at 302. It is worth noting that the Special Counsel is on record as having warned that any federal worker "who violates the Hatch Act necessarily risks prosecution by the Special Counsel." *French* v. *Devine*, 547 F. Supp. 443, 448 (D.D.C. 1982). As the district court below observed, the Special Counsel here gave the unions and their members "no reason to think" that if they went ahead with their planned drives he would "change his mind about them or not do his duty . . ." as prosecutor of Hatch Act violations (App., *infra*, 46a). The threat implicit in the Special Counsel's advice is further demonstrated when one considers whether the unions could have reasonably advised their members to proceed with their registration drives in the face of the Special Counsel's letter.

to the district court (NTEU J.A. 14, 18, 19; AFGE J.A. 17-24). The Special Counsel expressly stated that he considered these materials in drafting his advice letter (App., *infra*, 60a). Hence, it is evident that the Special Counsel's letter spoke to the legality of specific drives planned by the unions, giving this controversy an indisputable concreteness.[6] The unmistakable genuineness of this dispute is clearly demonstrated by the oppressive impact of the Special Counsel's ruling on the petitioners' conduct; it is undisputed that it induced them to cancel their registration activities. See *Int'l Society for Krishna Consciousness* v. *Eaves*, *supra*, 601 F.2d at 819.

The court nonetheless was unaffected by this reality and adverted to the "paucity" of information contained in the unions' request letter to the Special Counsel (App., *infra*, 6a). To be sure, the unions' letter could have fleshed out the particulars of each drive they wished

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[6] The majority seemed to imply that the union's request letter, by identifying "only the registration drives that the *national unions*" sought to engage in "through our locals and chapters," constituted a merely general inquiry not tied to any specific drives (App., *infra*, 18a). But seen in the context of this litigation it is clear that the unions' inquiry concerned the specific drives, identified in their court papers, which were to be carried out at the local level under the auspices of NTEU and AFGE. After all, it was the unions' desire to stage these very drives that triggered this litigation against the Special Counsel. It is obvious that the Special Counsel viewed these drives as the subject of the unions' letter. As the dissent noted, the language of the Special Counsel's advisory opinion shows that he "deemed the organizational structure of the drives entirely irrelevant," and that the drives identified in the unions' pleadings were plainly "the subject of the Special Counsel's opinion." (App., *infra*, 27a). Indeed, the majority's suggestion that the Special Counsel did not speak to drives sponsored by the unions and carried out by the locals is further belied, for example, by the fate of a registration drive scheduled by AFGE Local 3511 which represents employees of the Veterans Administration hospital in San Antonio, Texas. In express reliance on the Special Counsel's action, the Veterans Administration denied the union permission to hold its drive (App., *infra*, 27a).

to conduct, but a succinct inquiry to the Special Counsel was entirely appropriate given the context in which it was tendered. The brevity of the unions' letter was dictated by its objective: to discover, pursuant to the district court's instruction, whether the Special Counsel would apply to NTEU and AFGE his office's previously declared position that voter registration drives were to be deemed "partisan" if sponsored by a union which endorsed candidates for political office. The unions have never maintained that a local drive should not be examined to see whether partisan activity at the drive itself violates the Hatch Act; their only question was, would the national's endorsement automatically render a drive "partisan"? The Special Counsel's answer was, unreservedly, yes. If the unions' description of their drives was spare or "thin" it was because the OSC had already stated that, as far as it was concerned, a union's endorsement of candidates constituted the operative fact in transforming a neutrally conducted drive into a partisan endeavor.

In short, the exchange of letters between the unions and the Special Counsel must be viewed in the context of this litigation. It is plain that the exchange concerned the specific voter registration drives, planned by the unions' chapters and locals, the legality of which sparked the commencement of this action against the Special Counsel in the first place. Those planned drives ceased entirely during this litigation. Seen in this light, it is clear that the conflict between the unions and the Special Counsel was anything but abstract; the parties' dispute was firmly rooted in a concrete factual setting underscoring the very real adverse impact of the Special Counsel's advisory opinion.

The majority also sought to dismiss the threat implicit in the Special Counsel's letter by citing the infrequency of actual Hatch Act prosecutions brought by the Special Counsel (App., *infra*, 19a). It does not follow, however, that the unions' members were without

some legitimate "reason in fearing prosecution . . ." *Babbitt* v. *UFW*, 442 U.S. at 302. As the dissent astutely observed, regardless of the infrequency of prosecutions, "federal employees can hardly be faulted for concluding that registering voters in flagrant disregard of the Special Counsel's advice is not worth the grave risk to their livelihoods. Indeed, coerced compliance of [the kind achieved by the Special Counsel's advisory opinion] may well explain why . . ." so few Hatch Act prosecutions have needed to be initiated (App., *infra*, 23a).[7]

Moreover, this Court has itself recognized that even a total absence of enforcement of a statute is not determinative in deciding the appropriateness of judicial review. In *Epperson* v. *Arkansas*, 393 U.S. 97 (1968), the Court held invalid a statutory prohibition against teaching that man had evolved from other species of life. The suit had been brought by a teacher whose school adopted a text containing the prohibited "evolution" subject matter. The Court saw fit to decide the case—without even discussing ripeness—despite there being "no record of any prosecutions" under the statute. 393 U.S. at 101.

In sum, the majority's analysis too lightly dismissed the "onerous legal uncertainty" created by the Special Counsel's advisory ruling (App., *infra*, 48a). As we have shown, that ruling carried an unmistakable legal force by prompting the cancellation of numerous registration drives. In not appreciating that the unions' members had a well-based fear of prosecution, the majority below failed to recognize that the Special Counsel's opin-

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[7] Indeed, the statistical likelihood of prosecution here spreads the risk even more broadly: not just one employee, but perhaps hundreds or more must take the risk in order to obtain an adjudication of their rights. As previously noted, the unions, contrary to the majority's apparent suggestion (App., *infra*, 19a), could hardly advise their members to go ahead because the statistical likelihood of being caught is so low.

ion was justiciable because "tantamount to a threat of enforcement" (App., *infra*, 48a). The court's decision thus insured that federal workers across the nation are deprived of their fundamental First Amendment right to participate in voter registration drives sponsored by their unions.

2. The foregoing discussion demonstrates that in deviating from this Court's teachings on the justiciability of genuine threats of enforcement, the appeals court majority also gave short-shrift to the essential principles of ripeness enunciated by the Court in *Abbott Laboratories* v. *Gardner*, 387 U.S. 136 (1967). There, the Court instructed that challenges to administrative action are to be treated with a presumption of reviewability. *Id.*, at 140. The Court explained that a case's ripeness is a "flexible" matter, turning both on "the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." *Id.*, at 149-50. But as the dissent observed, the majority's analysis was disturbingly unbalanced (App., *infra*, 23a). It focused almost entirely on "the drawbacks to adjudication" and betrayed an inexplicable indifference to the severe hardship borne by federal workers as a result of denying review (*id*).

It is well settled that, in assessing the hardship of denying review, ". . . it is vital that courts take care to understand fully the present dilemma of the plaintiff." 13A Wright and Miller, *Federal Practice and Procedure*, Section 3532 at 121 (2d. ed. 1984). Professor Davis describes the hardship as "a dilemma for a private party who must choose between disadvantageous compliance and risking serious penalties." 4 K. Davis, *Administrative Law Treatise*, 369 (2d. ed. 1983). As we have noted, that classic dilemma is starkly posed here. If judicial review is denied, federal workers belonging to AFGE or NTEU must now comply with the Special Counsel's advice, at the expense of exercising

essential First Amendment rights, or disregard the opinion and run the risk of losing their jobs.[8]

In addition to not appreciating the quandary faced by the unions and their members, the majority failed to pay heed to this Court's teaching that "ripeness is peculiarly a question of timing." *Buckley* v. *Valeo*, 424 U.S. 1, 114 (1976), quoting *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 140 (1974). The petitioners here had an especially compelling need to obtain immediate review of the Special Counsel's ruling. The Special Counsel issued his letter in the midst of a presidential election year at a time when petitioners were actively organizing voter registration drives in anticipation of rapidly approaching registration deadlines for primaries and the general election. By denying prompt review of the Special Counsel's opinion, the majority ignored the exigent circumstances surrounding the unions' suit and insured that petitioners and their members were irreparably deprived of an opportunity to register voters in time for the 1984 election.[9]

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[8] See *Joseph* v. *United States Civil Service Commission*, 554 F.2d 1140 (D.C. Cir. 1977) where the court found ripe a challenge to certain Hatch Act regulations. The court stressed that "modern case law" reflected "a greater judicial willingness to aid litigants faced with the necessity of risking substantial harm in order to challenge the validity of government action." *Id.*, at 1151. The court emphasized that employees who want to challenge administrative application of the Hatch Act should not be required to jeopardize their jobs. *Id.*, at 1152. As the dissent below observed, "[a]lthough *Joseph* involved a challenge to regulations, we should be no more grudging about relieving uncertainties imposed by credible threats of enforcement, particularly when the threats may chill the exercise of First Amendment rights. This is the unambiguous teaching of *Steffel* v. *Thompson* . . ." (App., *infra*, 24a).

[9] It should be noted that the passing of the 1984 elections does not, of course, render this case moot. The vitality of this controversy is illustrated by this Court's decision in *Moore* v. *Ogilvie*, 394 U.S. 814 (1969). There, individuals challenged an Illinois statute under which they had been denied ballot certification as inde-

Instead of seriously examining the palpable hardship suffered by federal workers as a result of the Special Counsel's opinion, the majority below exhibited an incongruous preoccupation with several unconvincing reasons for denying review. The majority stressed foremost the technically non-binding nature of the Special Counsel's opinion. The court emphasized that the Special Counsel, pursuant to his prosecutorial function, merely presents alleged violations to the MSPB (App., *infra*, 11a). That body, which is the adjudicator of Hatch Act prosecutions, may ultimately reject the views of the Special Counsel when it speaks the final administrative word and decides a particular case (*id.*).

We find the court's concern about a technical absence of complete finality unduly formalistic and clearly at odds with the required pragmatic approach to adjudging ripeness. To be sure, with respect to Hatch Act prosecutions, the MSPB, and not the Special Counsel, does have the final administrative say, just as in criminal cases the courts, and not prosecutors, speak the final word on a party's guilt or innocence. But the court's observation about the role of the MSPB in Hatch Act adjudications misses the point as to why this case is justiciable. Ripeness here turns not on whether the Special Counsel's position may be finally upheld in some future administrative adjudication. Rather, this case is justiciable, as we have demonstrated, because the Special Counsel's opinion was

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pendent presidential electors for the 1968 election. The Court summarily dismissed an argument that no justiciable controversy existed since the 1968 election had been held. The Court observed that, while the election was over, the burden of the statute in question kept alive the parties' controversy; the problem was considered capable of repetition yet evading review and hence warranted resolution. The Court's reasoning in *Moore* clearly also applies to the Special Counsel's opinion here. Even with expedited treatment at each level, it took an entire election season to render conclusions in the court of appeals. If litigation had to begin anew in a new election season, the same result would inevitably occur.

reasonably perceived as carrying a serious threat of enforcement which has caused—and will continue to cause—irreparable harm to the constitutional rights of federal workers. The appeals court failed to recognize that by short-circuiting the petitioners' registration drives, the Special Counsel's action effectively precluded any potential "final" adjudication by the MSPB. Hence, to insist on such an adjudication as a prerequisite to judicial review is tantamount to insulating the Special Counsel's ruling forever from any review. This result is clearly untenable.

Indeed, this Court made clear in *Bantam Books* v. *Sullivan*, 372 U.S. 58 (1963) that the non-binding nature of official government action is not determinative of the existence of a ripe controversy where that action abridges First Amendment expression. In that case, the Rhode Island Commission to Encourage Morality in Youth had developed a practice of notifying book distributors that certain books were objectionable for sale to minors. The Commission had *no* enforcement powers with regard to the state's obscenity laws but its notices contained a reminder of the Commission's duty to recommend to the state attorney general prosecution of persons purveying obscene materials. The impact of receipt of these notices was to stop circulation of identified publications. The Court's decision agreed with the complaint of the distributors that the Commission's practices were unconstitutional censorship. Important for the instant case was the Court's rejecting as "naive" the state's contention that distributors were free to disregard the Commission's notices because they were "in the nature of mere legal advice." 372 U.S. at 68. The Court observed that "[p]eople do not lightly disregard public officers' thinly veiled threats to institute criminal proceedings against them if they do not come around . . ." *Id.* The Court found pivotal that the notices were "reasonably understood" as orders and "in fact stopped the circulation of the listed publication *ex propio vigore*." *Id.*

The lesson of *Bantam Books* for this case is clear. Without even discussing ripeness, that case recognized that a justiciable controversy exists where citizens feel reasonably intimidated by governmental action and cease engaging in First Amendment activity. *Bantam Books* teaches that the controversy presented here is, if anything, even more mature than the one brought against the Rhode Island Commission. The Commission lacked any prosecutorial function, yet the Court soundly concluded that distributors could not reasonably ignore the notices they received. Here where "advice" has been issued by the prosecuting official himself—and not merely a commission making a prosecution recommendation—federal workers could hardly prudently disregard it. The reasonable fear of prosecution resulting from the Special Counsel opinion, coupled with the opinion's stifling of First Amendment activity, are compelling justifications for finding a justiciable controversy in the instant case.[10]

Hence, the practical finality of the position stated in the Special Counsel's letter is undeniable. As shown, the reality here is that any "final" adjudication by the MSPB of the partisan nature of the unions' registration drive is a hypothetical event that will never come to pass. The demonstrated "coerced compliance" achieved by the Special Counsel insures that any enforcement adjudication by the MSPB has been precluded. In sum, there can be no real doubt that the Special Counsel's action here is "sufficiently final" for review, particularly when examined in a "flexible" and "pragmatic" way. *Abbott Lab-*

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[10] The infirmity of the majority's approach is further shown by its comparison of the Special Counsel's ruling to the routine informal opinions issued by subordinate government officials in other federal agencies (App., *infra*, 12a). Certainly, there are sound reasons why those tentative kinds of opinions should not be subject to review. The Special Counsel, however, as we have explained, is no mere subordinate government official: he is *the* official statutorily charged with prosecuting the Hatch Act and his views, as demonstrated here, are carefully heeded by federal workers.

oratories, 387 U.S. at 149-50. The denial of review by the majority below simply ignored the "immediate and practical effect" of the Special Counsel's advisory opinion. *Frozen Foods Express* v. *United States*, 351 U.S. 40, 44 (1956).

Along with its misplaced finality concerns, the majority also cited the "inhibitive effect judicial review might have . . ." on the Special Counsel's issuance of advisory opinions. The majority speculated that the Special Counsel "might hesitate" to dispense his advice if his opinions were open to judicial attack (App., *infra*, 13a). As the dissent observed, however, it is difficult to understand "why fear of litigation would lead the Office of the Special Counsel to keep its views to itself until *after* a violation of the Health Act has occurred, at which point there obviously is *no* possibility for the Office to vindicate its position without resort to adversary proceedings." (App., *infra*, 25a).[11] Furthermore, it must be appreciated that it simply does not follow that granting review here would subject the numerous informal advisory opinions of the Office of the Special Counsel to court challenges. While the Special Counsel's office may issue thousands of opinions annually on an informal basis—that is, over the telephone or via letters written by the Office's staff attorneys—what we attack here is something quite different and much rarer: a formal advisory opinion personally signed by the Special Counsel himself.[12]

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[11] Moreover, the dissent observed that it is hard to see how the Special Counsel could reasonably fear court challenges for issuing opinions that condoned proposed activities. The dissent noted that it was *this* kind of opinion commended by this court in *United States Civil Service Commission* v. *National Association of Letter Carriers*, 413 U.S. 548, 580 & n. 22 (1973) (App., *infra*, 25a).

[12] See *Office of the Special Counsel, U.S. Merit Systems Protection Board, A Report to Congress from the Office of Special Counsel: Fiscal Year 1983*, at 16 (1983).

The court additionally found the Special Counsel's opinion unfit for review on the ground that the unions "tendered no fact-particular case to or against the Special Counsel." (App., *infra*, 16a).[13] We have already shown why the court's concerns on this point were entirely misplaced (see *supra* at 11-13). We note, additionally, that the court's overstated concern about an alleged absence of factual detail is especially perplexing given the nature of the unions' challenge. That challenge, at bottom, presented a predominantly legal question: whether the Special Counsel correctly determined that a union's endorsement of a candidate for office automatically renders "partisan," within the meaning of the Hatch Act, union-sponsored voter registration drives which are conducted in a neutral fashion. No further factual development could conceivably sharpen this legal issue and hence it was properly justiciable. See *Pacific Gas and Electric Co.* v. *State Energy Resources Conserv.*, 461 U.S. 190 (1983).[14] As the dissent observed, it can hardly be said that unions have tendered no "crystallized controversy" given the Special Counsel's definitive declaration that it

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[13] The court's opinion also expressed an "exaggerated" concern that review of the Special Counsel's opinion would "short-circuit" the congressionally established scheme for deciding Hatch Act cases." (App., *infra*, 25a-26a). Judge Ginsburg's opinion worried that review of the Special Counsel's opinion would undermine the MSPB's role as "the administrative forum of first resort" for adjudication of Hatch Act disputes. Her views failed to persuade the other two members of the panel below. Both the dissent and Judge Edwards' concurring opinion pointed out that the governing statutory scheme gives the MSPB a circumscribed role in Hatch Act matters and hardly precludes the courts from considering Hatch Act disputes until the MSPB has spoken (App., *infra*, 21a, 26a).

[14] Moreover, even if a fuller factual record might arguably have been helpful, the courts have often recognized that where, as here, there is an urgent need for review, delay of court consideration is not warranted. See 13A Wright and Miller, *Federal Practice and Procedure*, Section 3532.3, at 156-160 (2d. ed. 1984).

was his "ineluctable conclusion" that the unions' registration drives were prohibited partisan activity within the meaning of the Hatch Act (App., *infra*, 24a-25a).

Finally, it should be clear that the approach of the majority below is at odds with numerous decisions of this Court recognizing the clear justiciability of pre-enforcement, anticipatory challenges of statutes or rules which inhibit the exercise of First Amendment rights. See *e.g.*, *Babbitt* v. *UAW*, *supra*; *Buckley* v. *Valeo*, *supra*; and *Clements* v. *Fashing*, 457 U.S. 957 (1982). As this Court indicated in *Steffel* v. *Thompson*, "[p]reconduct challenges to the validity of laws burdening First Amendment rights, are among the essential bulwarks of a system of free expression." *Morial* v. *Judiciary Commission of State of La.*, 565 F.2d 295, 298 (5th Cir. 1977), citing *Steffel* v. *Thompson*, 415 U.S. at 462. Indeed, the lead Hatch Act decision, *United States Civil Service Commission* v. *National Association of Letter Carriers*, 413 U.S. 548 (1973), provides a prime illustration of the unsoundness of the majority's conclusion that this case is insufficiently mature for review. There, the Court, without even discussing ripeness, examined plaintiffs' claims seeking an injunction against the Civil Service Commission's enforcement or threat of enforcement of the Hatch Act's prohibition against federal employee participation in partisan political activities. The Court noted at length the activities in which plaintiffs "desired to engage." 413 U.S. at 551-552, n.3. None of the plaintiffs were yet the subject of Commission enforcement proceedings. Nonetheless, their stated desire to engage in specific activity, argued to be protected by the First Amendment, combined with the various allegations of "threatened" enforcement actions stated a justiciable controversy.

The posture of this case establishes that it is even more mature for review than *Letter Carriers*. Like the plaintiffs in *Letter Carriers*, the unions here described in

detail the specific activity in which they and their members desired to engage. Here, however, the unions have gone one step further than the *Letter Carriers* plaintiffs. They actually have in hand a warning from the prosecutor of the Act that the activities in which they seek to participate are illegal. Hence, their challenge of the Special Counsel's construction of the Act gives the dispute they present an even sharper focus than the *Letter Carriers* plaintiffs' mere allegations concerning Hatch Act enforcement.

3. To summarize, it is clear that the conclusion of the majority below marks a radical departure from the common sense principles of justiciability enunciated by this Court. As we have demonstrated, the controversy posed here by the unions and their members is anything but remote or hypothetical. The opinion of the Special Counsel which they seek to challenge has had an undisputed impact on the parties' conduct and has terminated the unions' longstanding practice of sponsoring voter registration activity. In denying review here, the majority below failed to discern what has long been recognized as the basic policy of the Declaratory Judgment Act, 28 U.S.C. 2201-2202: "to settle legal rights and remove uncertainty and insecurity from legal relationships without awaiting a violation of the rights or a disturbance of the relationships". *Aetna Casualty & Surety Co.* v. *Quarles*, 92 F.2d 321, 325 (4th Cir. 1937). See *Terrace* v. *Thompson*, 263 U.S. 197 (1923).

By failing to see how the unions' members could reasonably fear prosecution if they disregard the Special Counsel's opinion, and by declining to appreciate the time-honored First Amendment rights being lost, the majority opinion leaves federal workers across the nation trapped in an inescapable dilemma. The abstractness that pervades the majority's deeply flawed analysis is manifestly antithetical to the pragmatism taught in this Court's ripeness decisions and indeed stands on its head the pre-

emption of reviewability enunciated in *Abbott Laboratories.*

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 84-5410

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO, et al.,
Appellants

v.

K. WILLIAM O'CONNOR, SPECIAL COUNSEL, MERIT SYSTEMS PROTECTION BOARD

No. 84-5414

NATIONAL TREASURY EMPLOYEES UNION,
Appellant

v.

K. WILLIAM O'CONNOR, SPECIAL COUNSEL, MERIT SYSTEMS PROTECTION BOARD

Appeals from the United States District Court
for the District of Columbia
(Civil Action Nos. 84-00972, 84-00974)

Argued August 31, 1984

Decided November 2, 1984

Gregory O'Duden, with whom *Lois G. Williams* was on the brief, for Appellant, National Treasury Employees Union in No. 84-5414.

Mitchell Jay Notis, with whom *Mark D. Roth* was on the brief, for Appellants, American Federation of Government Employees, AFL-CIO, et al. in No. 84-5410.

Neil H. Koslowe, Special Litigation Counsel, Department of Justice, with whom *Richard K. Willard*, Acting Assistant Attorney General, *Joseph E. diGenova*, United States Attorney, and *Leonard Schaitman*, Assistant Director, Department of Justice, were on the brief, for Appellee in Nos. 84-5410 and 84-5414.

John Vanderstar and *Arthur B. Spitzer* were on the brief for Amici Curiae American Civil Liberties Union and Project Vote!, urging reversal.

Before: MIKVA, EDWARDS, and GINSBURG, *Circuit Judges*.

Opinion for the Court filed by *Circuit Judge* GINSBURG.

Concurring Statement filed by *Circuit Judge* EDWARDS.

Dissenting Opinion filed by *Circuit Judge* MIKVA.

GINSBURG, *Circuit Judge*: The American Federation of Government Employees (AFGE) and the National Treasury Employees Union (NTEU) appeal a district court judgment declaring that an advisory opinion of K. William O'Connor, Special Counsel of the Merit Systems Protection Board (MSPB), "does not contravene the Hatch Act and is not unconstitutional." *American Federation of Government Employees v. O'Connor*, 589 F.Supp. 1551, 1563 (D.D.C. 1984). The Special Counsel's advice concerns the permissibility under section 9(a) of the Hatch Act, 5 U.S.C. § 7324(a)(2) (1982),[1] of voter registra-

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[1] An employee in an Executive agency . . . may not

. . .

(2) take an active part in political management or in political campaigns.

5 U.S.C. § 7324(a)(2) (1982). The MSPB is charged with adjudicating Hatch Act matters. *Id.* §§ 1205(a)(1), 1505. An employee held to have violated § 9 of the Act "shall be removed from his

tion drives conducted by members of public sector unions, after those unions have endorsed candidates for political office. AFGE and NTEU urge us to declare the Special Counsel's advisory opinion "illegal, void and contrary to law," AFGE Brief at 51; the government seeks affirmance of the district court's decision on the ground that the Special Counsel's advice "is reasonable and has a basis in fact." Government Brief at 26.

We hold that neither side is entitled to the disposition it seeks because the matter, as tendered to the district court and on appeal, is not ripe for judicial review. AFGE and NTEU have framed a general question not wedded to the facts of a particular case. They have named as sole defendant the MSPB's Special Counsel, an officer who may investigate, prosecute, and extend advice, but may not adjudicate Hatch Act liability. Adjudicatory authority in Hatch Act enforcement cases, at the administrative level, resides exclusively in the MSPB; that tribunal is not, in law or in practice, bound to follow the Special Counsel's advice. There is no indication at this time what position the MSPB would take on the question the unions pose.

Furthermore, the unions have barely sketched the contours of their case. They commenced this action without soliciting the Special Counsel's advice. Prompted by the district judge, the unions composed a terse inquiry to the Special Counsel, and received a return response formulated without investigation and with few hard facts in hand. The letter exchange between the unions and the Special Counsel presents unrefined issues in dim light. The unions' question, and the Special Counsel's answer, are not the stuff of a controversy ready for judicial review.

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position" unless the MSPB "finds by unanimous vote that the violation does not warrant removal," in which case "a penalty of not less than 30 days' suspension without pay shall be imposed." *Id.* § 7325. *But cf. infra* note 8.

Because the district court reached out prematurely to declare law applicable to controversies lacking precise shape, we vacate the judgment from which the unions have appealed; we remand the case with instructions to dismiss the complaints for failure to present concrete claims ripe for court adjudication.

I. BACKGROUND

This dispute centers on a letter opinion requested by the complaining parties and supplied by an officer who may investigate, prosecute, and advise, but whose advice binds no one. An earlier letter sparked the litigation. On February 29, 1984, James M. Peirce, president of the National Federation of Federal Employees (NFFE),[2] wrote John Erck, an attorney in the Office of the MSPB Special Counsel, to request written confirmation of an opinion Erck had expressed in a telephone conversation the day before. Erck had informed Peirce's aide that NFFE members could lawfully "conduct a nation-wide, non-partisan voter registration drive at their worksites," *see* NFFE Letter, *reprinted in* NTEU Joint Appendix (J.A.) 1a, as long as NFFE had not endorsed candidates for the upcoming presidential and congressional elections.

In a letter dated March 2, NTEU J.A. 4-5, Erck repeated this advice. He stated that, under the Hatch Act, "[f]ederal employees may participate in voter registration drives that are *not* identified with a political party or a partisan candidate for public office." However, he continued, "in our opinion," an organization's endorsement of a candidate would make it a "partisan club for the duration of the campaign." Erck's March 2 letter concluded:

> Members of NFFE may participate in a voter registration drive as long as the organization main-

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[2] NFFE is not a party to this action.

> tains its neutrality. In the event that NFFE endorses a candidate for President and/or candidates for the U.S. Congress, NFFE members who are federal employees would be required to cease their voter registration activities.

Id.

On March 27, AFGE sued the Special Counsel;[3] NTEU filed its own complaint a day later. Neither union, at that stage, had itself requested advice from the Special Counsel, and neither ever named any other party defendant. The complaints principally alleged that because the AFGE and NTEU national unions had endorsed presidential and congressional candidates for the approaching elections, Erck's letter to NFFE had discouraged AFGE and NTEU members from engaging or continuing to engage in nonpartisan voter registration drives. Erck's advice to NFFE, AFGE and NTEU asserted, thus violated public sector union members' first amendment freedoms of speech and association. AFGE and NTEU sought (1) an injunction stopping the Special Counsel from "enforcing or continuing in effect" his subordinate's March 2 letter to NFFE, and (2) a declaration that the "holding" of the March 2 letter was contrary to the Hatch Act and unconstitutional. AFGE J.A. 11. On March 30, the district court denied the unions' motions for temporary restraining orders, AFGE J.A. 24-25, and instructed AFGE and NTEU to ask the Special Counsel for an opinion regarding the particular voter registration activities in which they wished to engage.[4]

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[3] The named plaintiffs also included an AFGE local alleged to represent employees at a facility in Maryland and that local's president.

[4] The court cited French v. Devine, 547 F.Supp. 443 (D.D.C. 1982), as indicating the appropriate procedural course. There, a plaintiff precisely described political activities he wished to pursue and charged that the Hatch Act unconstitutionally barred him from engaging in them. The court believed that the justiciability of his complaint depended on receipt of an opinion from

The unions requested an advisory opinion from the Special Counsel on the following Monday, April 2. Their request letter contained a single paragraph describing the facts on which they sought advice:

> [NTEU] and [AFGE] have each endorsed a candidate for the presidency in 1984. Both unions, as has been our practice in the past, are now engaged, through our locals and chapters, in nonpartisan voter registration activity at worksites across the country. More specifically, at such registration activities, no attempt is made to solicit registrants on the basis of political party or candidate preference.

NTEU J.A. 35. The letter supplied no further particulars about the ongoing or proposed voter registration efforts of the national or local unions. NTEU and AFGE closed by reminding the Special Counsel that the unions had "commenced litigation challenging the legality of [Erck's] March 2, 1984 letter," and that counsel for the Office of Special Counsel had furnished assurance "in open court . . . that an opinion responding to our letter will be issued within the week." *Id.* at 36.

Four days later, on Friday, April 6, the Special Counsel addressed to counsel for NTEU and AFGE the advice letter on which the unions now center their plea for judicial review. In the opening paragraphs, the April 6 letter twice noted the "paucity of information" contained in the AFGE-NTEU letter of April 2. Also at the outset, the Special Counsel stated that his responsive letter was merely "advisory in nature," and that therefore "we have not conducted any investigation into your activity." *Id.* at 41.[5] The Special Counsel's letter next recounted

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the MSPB Special Counsel stating that the Hatch Act in fact forbade the proposed conduct.

[5] The Special Counsel additionally observed, however, that he had considered papers filed by the unions in connection with their lawsuit against him, "as well as other material in our files." NTEU J.A. 41.

some Hatch Act history and cited early Civil Service Commission adjudications establishing that voter registration drives could constitute prohibited political activity under certain circumstances. The Special Counsel then declared:

> The determination of whether a voter registration drive is a political campaign activity must be made from the available evidence. Although you state that, "no attempt is made to solicit registrants on the basis of political party or candidate preference," the absence of such "solicitation" at a voter registration information booth does not necessarily mean that the drive is not partisan; it is only one factor to be considered.

Id. at 44. The Special Counsel went on to list a number of other factors his office might consider relevant to a determination whether a particular voter registration drive violated the Hatch Act.[6] He further stated: "This is, of course, only a partial list . . . . Given the increasing use of voter registration as a tool in partisan political campaigns, we cannot accept at face value your assertion that the drive you plan is 'nonpartisan.'" *Id.* at 45.

At this point, the tenor of the letter changed. In place of comment on the few operative facts before the Special Counsel, and generalized, noncommittal, or tentative

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[6] Some other relevant factors might include other political activities of the sponsoring organization, the degree to which that organization has become identified with the success or failure of a partisan political candidate, issue or party, the nexus, if any, between the decision to undertake a voter registration drive and the other political objectives of the sponsor, whether particular groups are targeted for registration on the basis of their perceived political preference and the nature of publicity circulated to targets of the drive immediately prior to or during the drive.

Id. at 45.

observations, the advice became: "The material available to us indicates that your voter registration drives have become adjuncts to the political campaign activities of your unions." *Id.* at 46. Citing communiqués from leaders of the national unions and their locals that "emphasiz[ed] the importance of voter registration in advancing the campaigns of candidates which the unions support," the Special Counsel stated:

> [T]he ineluctable conclusion must be that those voter registration drives sponsored or conducted by the unions are, in fact, partisan. Accordingly, we must advise you that participation by federal employees in your unions' voter registration drives is prohibited political activity within the definition of the Hatch Act.

Id. at 47. "Of course," the Special Counsel added, "all federal employees[] remain free to participate in truly nonpartisan registration drives." *Id.*

AFGE and NTEU amended and renewed their requests for relief. After full argument and briefing, the district court issued its decision on June 29. The court first addressed questions of justiciability. No exhaustion-of-administrative-remedies barrier impeded immediate court adjudication, the district judge held, because there is no review track within the agency for advice the Special Counsel gives.[7] Turning to the ripeness of the unions' case, the court stated that although the Special Counsel's opinion "lack[ed] coercive legal effect," it

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[7] The court observed that "Congress has provided [the plaintiffs] with no mechanism for administrative review of an advisory opinion of the Special Counsel" short of "bait[ing] him into an enforcement action." American Fed'n of Gov't Employees v. O'Connor, 589 F.Supp. 1551, 1556-57 (D.D.C. 1984). "Exhaustion is appropriate," the court concluded, "only when a complainant is realistically able to seek administrative relief simply by applying for it, or when the administrative process has already begun." *Id.* at 1557.

"create[d] an onerous legal uncertainty" and was "tantamount to a threat of enforcement." *O'Connor*, 589 F.Supp. at 1559. In view of the severe penalties attending an MSPB adjudication that a federal employee has violated the Hatch Act—dismissal or, at a minimum, suspension without pay for thirty days, *id.* at 1552 (citing 5 U.S.C. § 7325 (1982))[8]—the district court concluded that the Special Counsel's advice in fact impels conformity. *Id.* at 1559. The court therefore held the unions "entitled to seek review of [the advice] without further delay." *Id.*

On the merits, however, the court found the Special Counsel's advisory opinion both consistent with the Hatch Act and constitutional. *Id.* at 1563. AFGE and NTEU defend the district court's ruling on ripeness and urge reversal of the decision on the merits.

II. Discussion

In their initial briefs, the unions and the government grappled almost exclusively with the broad first amendment question presented to and decided by the district court. At oral argument we inquired into the ripeness of the case for judicial review, *see Abbott Laboratories v. Gardner*, 387 U.S. 136 (1967), and we subsequently allowed both sides to submit supplemental briefs addressed to that threshold matter.[9] We raised the ripeness issue on our own motion because it "involve[s], at least in part," *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 138 (1974), the limits article III places on judicial power. *See generally* G. Gunther, Cases and Materials on Constitutional Law 1655-66 (10th ed.

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[8] *See supra* note 1. We note but do not decide the question whether the MSPB, in view of the first amendment rights implicated, may suspend penalties when there is a genuine issue as to the permissibility of the conduct involved.

[9] American Fed'n of Gov't Employees v. O'Connor, Nos. 84-5410 & 84-5414 (D.C. Cir. Sept. 7, 1984) (order granting motion to file supplemental briefs).

1980). Mindful of those limits, we conclude that two prime facets of the AFGE and NTEU complaints render the case the unions have framed unsuitable for court adjudication, *see Abbott Laboratories*, 387 U.S. at 149: (1) the character of the administrative action AFGE and NTEU challenge; (2) the sweeping generality of the case the unions have chosen to state.

A.

AFGE and NTEU solicited advice from the MSPB's Special Counsel, and now seek a judicial declaration that the advice they obtained is void. In effect, the unions would have article III judges rewrite the Special Counsel's advisory opinion. But the advice the Special Counsel is permitted to give creates no law and binds neither the public nor any agency or officer of government. No precedent known to us sanctions court review of such nonbinding advisory expositions.[10]

To clarify the position of the Special Counsel in relation to Hatch Act enforcement, we describe Congress' three-way division in 1978 of the authority once vested entirely in the Civil Service Commission (CSC).[11] Under the Civil Service Reform Act of 1978, Pub. L. No. 95-454, 92 Stat. 1111, the MSPB is charged with adjudicating Hatch Act cases,[12] the Office of Personnel Management

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[10] By contrast, the "advisory opinions" we reviewed in National Conservative Political Action Comm. v. Federal Election Comm'n, 626 F.2d 953 (D.C. Cir. 1980) (per curiam), and in National Automatic Laundry & Cleaning Council v. Shultz, 443 F.2d 689 (D.C. Cir. 1971), constituted final and authoritative statements of position by the agencies to which Congress had entrusted the full task of administering and interpreting the underlying statutes.

[11] For an overview of the former regime, see United States Civil Serv. Comm'n v. National Ass'n of Letter Carriers, 413 U.S. 548, 559 (1973).

[12] 5 U.S.C. § 1205(a)(1) (1982); *see also id.* § 1505 (parallel responsibilities with regard to certain state and local government employees).

(OPM) is responsible for promulgating Hatch Act regulations,[13] and the Office of the Special Counsel is empowered to investigate allegations of Hatch Act violations and to present them to the MSPB.[14] In line with contemporary separation-of-powers and due process jurisprudence, *see, e.g.*, M. MCCLINTOK, NLRB GENERAL COUNSEL 14-15 (1980), the prosecutorial and adjudicatory arms of the statutory scheme work independently;[15] the MSPB is free to disagree with the Special Counsel and often does. *See, e.g., Special Counsel v. Biggs*, 1983 FED. MERIT SYS. REP. (LAB. REL. PRESS) ¶ 5238 (Aug. 23, 1983); *see also Developments in the Law—Public Employment*, 97 HARV. L. REV. 1611, 1643 (1984) (Office of the Special Counsel's "seemingly broad powers are greatly circumscribed in practice, [in part] by the Special Counsel's lack of authority to require either the Board or other agencies to do its bidding") [hereafter cited as *Developments*].[16]

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[13] Section 102 of the President's Reorganization Plan of 1978, 92 Stat. 3783, *reprinted in* 5 U.S.C. § 1101 note (1982)—which defines the new structure of the civil service to the extent that the Civil Service Reform Act of 1978 does not provide to the contrary, *see* Pub. L. No. 95-454, § 905, 92 Stat. 1111, 1224—states: "Except as otherwise specified in this Plan, all functions vested by statute in the [CSC] . . . are hereby transferred to the Director of the [OPM]." *See also* 5 U.S.C. § 7327 (1982) (explicitly conferring authority to prescribe regulations granting Hatch Act exemptions).

[14] 5 U.S.C. §§ 1206(e)(1)(A)-(B), (g)(1), 1504 (1982).

[15] In French v. Devine, 547 F.Supp. 443 (D.D.C. 1982)—which held justiciable an MSPB Special Counsel opinion, *see supra* note 4—the court seemed to assume that the MSPB and the Special Counsel regularly act in concert. *See* 547 F.Supp. at 446-47.

[16] Even when the MSPB ultimately upholds the Special Counsel's position on Hatch Act matters, the Board does not appear to regard the employee's preenforcement good-faith rejection of the Special Counsel's opinion as an "aggravating circumstance" warranting the stiffest of penalties. *See* Special Counsel v. Yoho, 1983 FED. MERIT SYS. REP. (LAB. REL. PRESS) ¶ 5136, at X-5067 (June 10, 1983).

When Congress positions an agency to speak the final administrative word on the meaning of a statute, and that agency talks, judicial review of the pronouncement may well be in order. *See, e.g., Joseph v. United States Civil Service Commission*, 554 F.2d 1140 (D.C. Cir. 1977); *Continental Air Lines v. Civil Aeronautics Board*, 522 F.2d 107 (D.C. Cir. 1975) (en banc); *National Automatic Laundry & Cleaning Council v. Shultz*, 443 F.2d 689 (D.C. Cir. 1971); *National Student Association v. Hershey*, 412 F.2d 1103 (D.C. Cir. 1969).[17] Here, in contrast, we have only the advice of an officer Congress did not authorize to speak definitively. The Special Counsel neither represents the views of the MSPB nor holds sway over it; his advisory opinions offer essentially a forecast, albeit an educated one, on the way the MSPB would rule if an actual case materialized.[18] Like the advisory letters and opinions offered in diverse government quarters, *see Automatic Laundry*, 443 F.2d at 699-700 & n.10, such counsel "can serve the [salutary] purpose of providing an informed though not binding prediction," but "[t]here are sound reasons why [the advice] should not be subject to judicial review." *Id.* at 699.[19]

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[17] *But cf.* Sullivan v. Division of Elections, 718 F.2d 363 (11th Cir. 1983) (holding nonjusticiable a challenge to an election commission's advisory opinion and to the Florida statute authorizing it).

[18] Nor does the record or case law genuinely support characterization of the Special Counsel's opinion as a justiciable "threat of enforcement." *See infra* pp. 19-20 & note 25.

[19] In Boating Indus. Ass'ns v. Marshall, 601 F.2d 1376 (9th Cir. 1979), the court found nonjusticiable a challenge to an interpretation of the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901-950 (1982), issued by the Office of Workers' Compensation Programs (OWCP), an agency with power only to bring compensation cases before the Benefits Review Board. The court observed:

> Notice No. 21 is not a regulation issued under congressional mandate in assistance of the OWCP's regulatory powers.

One salient, practical reason is the inhibitive effect judicial review might have on the performance of a valuable public service. We note that in 1983, the Office of the Special Counsel issued some 4000 informal advisory opinions concerning the Hatch Act. *See Developments, supra pp.* 11-12, at 1654 (citing OFFICE OF THE SPECIAL COUNSEL, U.S. MERIT SYS. PROTECTION BD., A REPORT TO CONGRESS FROM THE OFFICE OF SPECIAL COUNSEL: FISCAL YEAR 1983, at 16-17 (1983) [hereafter cited as REPORT]). If every such opinion that displeased the party requesting it could be attacked in court, the Special Counsel might hesitate to devote the limited resources of his office to this work.[20]

The Special Counsel's authority to issue advisory opinions regarding the Hatch Act derives from 5 U.S.C. § 1206(*l*) (1982), which apparently codifies past CSC practice under pre-1978 civil service law. *See United States Civil Service Commission v. National Association*

> Rather, this ruling derives from the requirement that the Secretary [of Labor] provide "information and assistance" when requested. . . . This section should not be expanded into a congressional mandate for preenforcement review of any of the Act's provisions for which assistance is requested.

Id. at 1382 n.6. The court added that "the possibility of criminal sanctions applying does not of itself create a case or controversy." *Id.* at 1385.

[20] The Special Counsel must choose his projects carefully, for "budgetary . . . and staffing problems . . . have plagued [his] Office since its inception." *Developments, supra* pp. 11-12, at 1643-44.

The observation this court made some 40 years ago remains sound in a case such as the present one:

> To permit suits for declaratory judgments upon mere informal, advisory, administrative opinions might well discourage the practice of giving such opinions, with a net loss of far greater proportions to the average citizen than any possible gain which could accrue.

Helco Prods. Co. v. McNutt, 137 F.2d 681, 684 (D.C. Cir. 1943).

of Letter Carriers, 413 U.S. 548, 580 & n.22 (1973). In reaffirming the constitutionality of the text of the Hatch Act, the Supreme Court specially commended this mechanism for dispensing informal advice; the Court believed that the availability of a preliminary opinion in advance of employee action would *alleviate* the Act's potential to chill the exercise of first amendment rights. *Id.* But if the Special Counsel could be haled into court every time there was heard a discouraging word from his office, the giving of needed advice would perforce be hampered and might well be paralyzed. Absent some indication that the Special Counsel has metamorphosed from a counsel and constructor of safe harbors into a determined censor of government employees' political activities, judges should not jeopardize a process that the High Court has identified as a saving grace of Hatch Act administration.

The prospect that our routine surveillance would hobble the Special Counsel in his role as a counselor bears on a larger concern; judicial review of the Special Counsel's advice, we believe, would be discordant with the congressionally established scheme for deciding Hatch Act cases. Court oversight of the Special Counsel's opinions would either short-circuit that scheme or introduce a most peculiar doubling of judicial effort.

Congress has installed the MSPB as the administrative forum of first resort in the adjudication of Hatch Act enforcement cases and—at the MSPB's option or the Special Counsel's request—in the review of Hatch Act regulations promulgated by the OPM. *See* 5 U.S.C. § 1205(e) (1982). The MSPB has thus inherited the CSC's "accustomed role" of refining the law of prohibited political activities through the continual decision of cases and the coordination of the rules that emerge from them: the process of applying administrative experience and expertise to the ever-varying fact patterns in this constitutionally delicate field is one "that Congress necessarily anticipated would occur down through the years." *Letter Carriers*, 413 U.S. at 574-75.

Were we to allow parties discontent with the Special Counsel's advice to proceed directly to court, bypassing the MSPB altogether, we would strip the MSPB of the authority Congress allocated to that body as tribunal of first instance.[21] The government proposed a solution to this particular problem. It suggested that we adopt a relaxed standard of review and simply inquire whether the Special Counsel's advice was "reasonable and ha[d] a basis in fact." Government Brief at 26. Were we to follow that path, we would become engaged in the construction of initial court rulings of little practical import and with scant precedential impact upon the MSPB; we would involve judges in a progression from tentative preview of Special Counsel opinions to dispositive review of MSPB decisions. If this sort of yo-yo review has antecedents in federal practice, we are unfamiliar with them; nor are we aware of any warrant from Congress to create such a curiosity.[22]

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[21] As Judge McGowan observed in another case involving the justiciability of constitutional claims under the Hatch Act:

> Enforcement by the [CSC] only after hearing may mean, in one case, that there is no adverse application of the statute to complain of, and, in the next, that the constitutional issue goes before the court on a fully developed record. It is not irrational for both Congress and court to think that the virtues of this approach in terms of the most efficient employment of judicial resources are to be weighed in the balance as against the claims even of the First Amendment.

Dingess v. Hampton, 305 F.Supp. 169, 174 (D.D.C. 1969) (three-judge court); *see* Golden v. Zwickler, 394 U.S. 103, 110 (1969).

[22] Although the concerns expressed here—preserving administrative authority and conserving judicial resources—are typically cited in aid of requiring the exhaustion of administrative remedies (a requirement the district court found inadequate to describe impediments to federal court review of the Special Counsel's opinion, *see supra* p. 8 & note 7), we believe that both considerations are comprehended by the "fitness for judicial decision" criterion of ripeness as well. *Cf.* Public Citizen Health Research Group v. Commissioner, Food & Drug Admin., 740 F.2d 21, 30 (D.C. Cir.

B.

Even if the Special Counsel could dictate to the MSPB in Hatch Act matters, we would question the fitness for review of the unions' case.[23] As a commentator not unfriendly to preenforcement judicial review reminds us:

> No court should decide an issue that has not been properly clarified and no court should decide any question without needed facts. A case is clearly unripe for judicial determination if issues are unclear or needed facts are undeveloped.

K. DAVIS, ADMINISTRATIVE LAW TREATISE § 25:11, at 385 (2d ed. 1983).

Courts customarily deal in specific facts or circumstances drawn with some precision and legal questions trimmed to fit those facts or circumstances; they are not in the business of deciding the general without reference to the specific. *See Toilet Goods Association v. Gardner*, 387 U.S. 158, 162-64 (1967); *Andrade v. Lauer*, 729 F.2d 1475, 1481 (D.C. Cir. 1984).[24] AFGE and NTEU, however, tendered no fact-particular case to or against the Special Counsel. Instead, the unions solicited an assurance that their registration activities, broadly and

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1984) ("ripeness" and "finality" doctrines "tend to converge in that both are meant to prevent premature judicial intervention in the administrative process").

[23] Whether the opinion constitutes "final agency action" under § 10 of the Administrative Procedure Act, 5 U.S.C. § 704 (1982), we need not decide. We note, however, that it is difficult to regard an advisory opinion reflected upon, researched, and written on four days' notice—at the behest of parties who held the Special Counsel's feet to the fire of litigation while providing him with few facts—as a product of the agency's considered judgment.

[24] The facts may be "hypothetical," *see Automatic Laundry*, 443 F.2d at 692, provided that they are sufficiently numerous to furnish a concrete setting for review (and sufficiently typical to make that review worthwhile).

briefly described, would be given carte blanche as long as participants made "no attempt . . . to solicit registrants on the basis of political party or candidate preference." NTEU J.A. 35. The Special Counsel denied the unions the general license they sought, but that action in itself presents no crystallized controversy.[25] In short, the case proffered by AFGE and NTEU against the Special Counsel contains a broadside, but no precise fact accounting on the unions' side; no "reflective examination in the course of [any] agency's interpretative process"; and none of the "signposts of authoritative determination, finality and ripeness" that have pointed us in other cases toward judicial review.[26] *See Automatic Laundry*, 443 F.2d at 702.

At oral argument, AFGE suggested that a two-letter exchange in the record[27] indicated the specificity and maturity of this case. The first letter, dated March 26, 1984, is a request from an AFGE local in San Antonio, Texas, for permission to conduct a worksite voter regis-

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[25] On the contrary, the Special Counsel's reservation of his right not to rush to judgment about a broad category of cases, but instead to consider in every instance a number of "relevant factors," *see supra* note 6, underscores the indefiniteness of this dispute, despite the presence of categorical language in the concluding portion of the advisory letter. The letter advice does not, by its terms, disclose the Special Counsel's intentions about enforcement; and the list of "other relevant factors" affords the Special Counsel enough flexibility to ensure that the very human tendency to stand by one's publicly expressed opinions would not dictate proceedings against participants in particular voter registration drives.

[26] NTEU contends that the Special Counsel should have declined to rule or requested more facts if he believed that he was short on meaningful information. NTEU Brief at 30. But the unions themselves effectively foreclosed these options by pressuring the Special Counsel to render an opinion "within the week." *See* NTEU J.A. 36.

[27] AFGE J.A. 22-23. AFGE brought the letters to the district court's attention on March 30, 1984. *See id.* at 2.

tration drive. The second is a response from the employing unit (a Veterans Administration hospital) in San Antonio, dated March 27, 1984; the response relies on the Special Counsel's "ruling" (apparently, the March 2 letter to NFFE) to deny the request.

We express no view on the current justiciability of the suggested San Antonio case. Plainly, it is not the one before us. Neither the San Antonio local [28] nor the employing unit is a party to this action. Moreover, the Special Counsel was never asked to, and did not in fact, explore any questions concerning the independence of local unions from their parent organizations; such questions might well prove central to the Special Counsel's conclusions about the effect of the national unions' endorsements on voter registration activities in a given case. It was the district court's view, we note, that if a local could make a "clear showing" of autonomy, "then participation [in registration drives] might occur with impunity, assuming, of course, that the local itself remained uncommitted." *O'Connor*, 589 F.Supp. at 1562. But the AFGE-NTEU letter request advanced no claim of that character. The letter identified broadly and only the registration drives that *the national unions* had conducted in the past "through [their] locals and chapters." *See supra* p. 6.

The Special Counsel has confronted no AFGE or NTEU member with a prosecution threat should he or she participate in a particular voter registration drive. Indeed, the fact-thin quality of the case AFGE and NTEU have stated precludes a court from holding, with fidelity to Supreme Court precedent, that "a genuine threat of enforcement" has been demonstrated here. *Cf. Steffel v. Thompson*, 415 U.S. 452, 455-56 & n.4, 459 (1974) (two threats of arrest; companion actually arrested; prosecu-

[28] There is no indication in the record that any local requested the Special Counsel's advice about that local's particular situation.

tion likely): *id.* at 476 (Stewart, J., concurring) ("genuine threat" cases will be "exceedingly rare"); *Kaplan v. Hess*, 694 F.2d 847 (D.C. Cir. 1982) (threat by judge, the ultimate decisionmaker, to jail for contempt). It is of some significance in this regard that in 1983, in addition to issuing "roughly 4,000 informal advisory opinions regarding the Hatch Act," the Special Counsel "received 86 allegations of violations, and initiated two prosecutions." *Developments*, *supra* pp. 11-12, at 1654 (citing REPORT, *supra* p. 13, at 16-17). Since the creation of his office in 1978, the Special Counsel has never initiated more than thirteen Hatch Act prosecutions in a single year. *Id.* at 1654 n.25 (citing REPORT, *supra* p. 13, at 17). And given the "political, budgetary, and staffing problems that have plagued the Office since its inception," *id.* at 1643-44, the number of prosecutions seems unlikely to increase markedly in the near future.[29] *See also supra* note 8.

CONCLUSION

Our rejection of the instant action on ripeness grounds is without prejudice to the unions' rights to pursue any other remedies they may have. AFGE and NTEU or their locals may wish, for example, to formulate further, more detailed requests for advice; on a fuller statement of facts, and with more time for consideration, the Special Counsel may well reach other conclusions.[30]

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[29] *See* Wash. Post, Apr. 17, 1984, at A19, col. 4 (quoting statement of W. William O'Connor, MSPB Special Counsel, that his office "stress[es] education, rather than prosecution").

[30] The district court commented that if the generality of the advice generated hardship, the problem was in large part one of the unions' making, for the Special Counsel

> could tailor his opinion only as narrowly as plaintiffs' request would allow. . . . [H]e was given few facts and was not advised of others . . . which might have permitted a narrower ruling . . . . Should [plaintiffs] desire clarification, they are

Moreover, although the 1984 elections will soon be history, the unions may seek to prevent a recurrence of their present problems by requesting an OPM rulemaking—ultimately reviewable in court, *see Joseph v. United States Civil Service Commission*, 554 F.2d 1140 (D.C. Cir. 1977)—on voter registration drives.[31] Finally, we leave for another day and case the question whether federal employees and their unions may proceed against an employing unit for refusing a request to conduct a worksite voter registration drive.

The judgment of the district court is vacated[32] and the case is remanded with instructions to dismiss the unions' complaints for failure to present claims currently ripe for court adjudication.

It is so ordered.

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free to supply the Special Counsel with more information and ask him to elaborate.

O'Connor, 589 F.Supp. at 1563.

[31] And if the OPM is unresponsive, the unions may ask Congress to act. *See* Wash. Post, Oct. 5, 1984, at A21, col. 1 (Senate resolution instructing OPM Director that nonpartisan voter registration drives do not violate § 2(6) of the Intergovernmental Personnel Act of 1970, 42 U.S.C. § 4701(6) (1982)).

[32] This disposition dispels whatever incremental chilling effect the existence of a district court decision upholding the Special Counsel's opinion on the merits may have.

EDWARDS, *Circuit Judge*, concurring: This case is complicated because of the posture in which it comes before us. The appellants seek to challenge an advisory opinion issued by the Special Counsel, an official charged solely with authority to prosecute cases before the Merit Systems Protection Board ("MSPB"). Under these circumstances, I view the suit as a nonjusticiable action against a prosecutorial official. In addition, I regard the case as unripe for adjudication for the reasons stated in Part II.B of Judge Ginsburg's opinion. I therefore join the opinion of the court.

I wish to dissociate myself, however, from any possible suggestion that all cases that implicate the Hatch Act are within the exclusive jurisdiction of the MSPB. As I read the statute, the MSPB's authority with regard to the Hatch Act is limited to adjudicating alleged violations, reviewing regulations issued by the Office of Personnel Management, and performing certain related tasks. *See* 5 U.S.C. § 1205(a), (e) (1982).

Therefore, I do not believe the role of the MSPB in Hatch Act enforcement cases would pose any obstacle to federal court adjudication of cases that might implicate the Hatch Act in other ways. I think it clear, for example, that a declaratory relief action by federal employees or unions, challenging the denial of permission by a federal employer agency to use its facilities for voter registration, would not be barred on the ground that it would circumvent the jurisdiction of the MSPB. Congress has assigned the MSPB jurisdiction to determine Hatch Act violations; that grant of jurisdiction does not stand as a barrier to normal adjudication of otherwise properly presented constitutional or statutory claims.

MIKVA, *Circuit Judge, dissenting*: The American Federation of Government Employees and the National Treasury Employees Union wish to register citizens to vote. The Special Counsel of the Merit Systems Protection Board, who is responsible for bringing charges under the Hatch Act, has advised the unions unequivocally that the Act prohibits federal employees from participating in drives the unions sponsor, no matter how neutrally the drives are conducted. The court today finds no controversy between the unions and the Special Counsel ripe for adjudication; I disagree.

I

I start from the assumption that, as a general matter, federal courts should be available to adjudicate concrete disputes involving federal law. For a variety of reasons, we at times find it necessary or appropriate to refrain from resolving cases brought before us, but I think the public pays us mainly to settle controversies, not to avoid them. Before refusing to hear a case within our jurisdiction, we should therefore consider the costs of our refusal to the parties and the public with at least as much sensitivity as we bring to our assessment of the benefits.

This is especially true when, as today, the court's concern is ripeness. The Supreme Court has instructed that whether a case is ripe is a "flexible" matter that depends on "both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." *Abbott Laboratories v. Gardner*, 387 U.S. 136, 149-50 (1967). Accordingly, we have taken a pragmatic, balancing approach to the constitutional as well as the prudential component of ripeness. *See Andrade v. Lauer*, 729 F.2d 1475, 1480 (D.C. Cir. 1984); *National Student Association v. Hershey*, 412 F.2d 1103, 1115 (D.C. Cir. 1969). What I find most distressing about today's decision is that, in sharp contrast to the

majority's extensive analysis of the drawbacks to adjudicating the case before us, the court limits its discussion of the hardship likely to be caused by its restraint to a remarkable suggestion that the Special Counsel's opinion carries no serious threat of enforcement and a passing recommendation that the unions seek relief from the Office of Personnel Management or from Congress.

The majority dismisses far too quickly the appellants' interest in a prompt adjudication of their dispute with the Special Counsel. The practical consequence of today's decision is that, unless federal workers are willing to put their jobs on the line, the Special Counsel's construction of the Hatch Act will remain the law: employees throughout the nation will effectively be barred from participation in neutrally conducted voter registration drives sponsored by AFGE or NTEU. The *minimum* penalty for violation of the Hatch Act is thirty days' suspension without pay, and outright dismissal is required in all cases in which the Merit Systems Protection Board does not vote *unanimously* for a lesser sanction. *See* 5 U.S.C. § 7325 (1982). No matter how infrequently the Special Counsel has brought Hatch Act charges in the past, federal employees can hardly be faulted for concluding that registering voters in flagrant disregard of the Special Counsel's advice is not worth the grave risk to their livelihoods. Indeed, coerced compliance of this sort may well explain why to date the Special Counsel has rarely found it necessary to initiate enforcement actions.

As the district court recognized, declaratory relief has long been available to alleviate precisely such "debilitating uncertainties about governmental requirements imposed on private parties." 4 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 25:16, at 411 (2d ed. 1983). Much of the point behind the Federal Declaratory Judgment Act, 28 U.S.C. §§ 2201-2202 (1982), is "to settle legal rights and remove uncertainty and insecurity from legal rela-

tionships without awaiting a violation of the rights or a disturbance of the relationships." *Aetna Casualty & Surety Co. v. Quarles*, 92 F.2d 321, 325 (4th Cir. 1937) (Parker, J.). Moreover, we have noted that "modern case law . . . reflects a greater judicial willingness to aid litigants faced with the necessity of risking substantial harm in order to challenge the validity of governmental action," and that, in particular, employees who wish to challenge administrative implementation of the Hatch Act should not be forced to jeopardize their jobs. *Joseph v. United States Civil Service Commission*, 554 F.2d 1140, 1149-52 (D.C. Cir. 1977).

Although *Joseph* involved a challenge to regulations, we should be no more grudging about relieving uncertainties imposed by credible threats of enforcement, particularly when the threats may chill the exercise of first amendment rights. This is the unambiguous teaching of *Steffel v. Thompson*, 415 U.S. 452 (1974), where the Supreme Court held that a leafletter faced with a genuine threat of criminal charges need not "first expose himself to actual arrest or prosecution to be entitled to challenge a statute that he claims deters the exercise of his constitutional rights." *Id.* at 459. We have recognized that the principle underlying *Steffel* extends to threats of sanctions other than criminal prosecution. *See Kaplan v. Hess*, 694 F.2d 847, 851 (D.C. Cir. 1982).

The majority depicts the Special Counsel's opinion as too general and tentative to constitute a credible threat of enforcement or to present a "crystallized controversy." Maj. op. at 16-20. But no matter how many factors the Special Counsel indicated might be relevant in some situations to determining whether a voter registration drive was partisan, his evaluation of the drives sponsored by AFGE and NTEU was anything but tentative:

> Where, as here, the unions have endorsed partisan candidates, and where, as here, the unions have issued public statements and communications to their

> membership emphasizing the importance of voter registration in advancing the campaigns of candidates which the unions support, the ineluctable conclusion must be that those voter registration drives sponsored or conducted by the unions are, in fact, partisan. Accordingly, we must advise you that participation by federal employees in your unions' voter registration drives is prohibited political activity within the definition of the Hatch Act.

Letter from K. William O'Connor to Lois Williams and Mark Roth at 7 (Apr. 6, 1984), AFGE J.A. at 34, NTEU J.A. at 47. As the district court recognized, an advisory opinion of such specificity, issued by the official statutorily charged with initiating punitive proceedings under the Hatch Act, is clearly tantamount to a threat of enforcement. The majority's assertion to the contrary is hard to fathom.

II

Almost as puzzling as the court's peculiar insensitivity to the first amendment interests of federal employes is its exaggerated solicitude for the administrative difficulties our resolution of this controversy might cause. I cannot understand, for example, why fear of litigation would lead the Office of the Special Counsel to keep its views to itself until *after* a violation of the Hatch Act has occurred, at which point there obviously is *no* possibility for the Office to vindicate its position without resort to adversary proceedings. Even harder for me to grasp is how the Special Counsel could reasonably fear being haled into court for issuing an advisory opinion that *condoned* proposed activity—the kind of opinion valued so highly by the Supreme Court and the majority for its role in alleviating coercive uncertainties under the Act. *See* maj. op. at 14. More mysterious still is why the court so readily discerns the possibility that aversion to litigation will silence the Special Counsel in this way, but not the possibility that the Special Counsel will bring

charges against those who disregard his advice, or the possibility that employees might reasonably fear such charges.

Similarly exaggerated is the court's concern not to "short-circuit" the "congressionally established scheme for deciding Hatch Act cases." Maj. op. at 14-15. Congress has indeed made the Merit Systems Protection Board "the administrative forum of first resort" for adjudication of certain Hatch Act disputes: those initiated by the Special Counsel rather than by employees. As Judge Edwards points out, however, this statutory grant of authority hardly constitutes a legislative command that courts refrain from considering *any* Hatch Act controversies before the Board has had its say. At a minimum, it should take a much clearer statement of congressional intent to so circumscribe the historic role of federal courts in protecting federal rights. *Cf. Borrell v. United States International Communication Agency*, 682 F.2d 981, 989 (D.C. Cir. 1982).

As the Supreme Court recognized in *Steffel v. Thompson*, moreover, the federal courts do not disrupt or circumvent an independent adjudicative system when they resolve matters within their province before proceedings even commence in the other forum, particularly when those proceedings cannot be initiated by the party seeking federal relief. In *Steffel*, the Court concluded that general principles prohibiting federal courts from interfering with state criminal proceedings do not apply when a declaratory judgment is sought before state proceedings are commenced. To hold otherwise, the Court noted, might "place the hapless plaintiff between the Scylla of intentionally flouting state law and the Charybdis of forgoing what he believes to be constitutionally protected activity in order to avoid becoming enmeshed in a criminal proceeding." 415 U.S. at 462. Surely the interest of federal employees in avoiding a similar dilemma warrants flexibility in our application of whatever silent directives

we infer from Congress' grant of jurisdiction to the Merit Systems Protection Board.

III

The practical implications of today's decision for the first amendment rights of federal employees can perhaps best be appreciated by considering the situation of AFGE Local 3511, which represents workers at the Veterans Administration hospital in San Antonio. In the past, Local 3511 has registered voters at the hospital. This year, in explicit reliance on the Special Counsel's advice, the Veterans Administration has denied the union permission to conduct its registration drive. *See* AFGE J.A. at 22-23.

The Veterans Administration can hardly be faulted for its decision. Contrary to the majority's suggestion, *see* maj. op. at 18-19, drives of the sort proposed by Local 3511 were precisely the subject of the Special Counsel's opinion. The appellant unions expressly informed the Special Counsel that their registration drives would be conducted through their locals and chapters, and the categorical language of the advisory opinion makes clear that the Special Counsel deemed the organizational structure of the drives entirely irrelevant.

The court today refuses to second-guess the constitutional wisdom of the Special Counsel, but suggests that Local 3511 may be able sue to the Veterans Administration. It is unclear why the court thinks that such a suit, but not the one presently before us, would leave intact "the authority Congress allocated to [the Merit Systems Protection Board] as tribunal of first instance" for Hatch Act enforcement matters. Maj. op. at 15. In any event, the prospects for obtaining meaningful judicial relief in this way are at best uncertain. Quite apart from the logistical difficulties posed for union litigants by the multiplicity of federal employing agencies, the MSPB—in its " 'accustomed role' of refining the law of prohib-

ited political activities through the continual decision of cases and the coordination of the rules that emerge from them," *id.* —— has concluded that the Special Counsel's responsibility for Hatch Act enforcement is exclusive, *see Sims v. Government of the District of Columbia*, 6 M.S.P.B. 652, 654 (1981).

Of course, the members of Local 3511 remain free to disregard the advisory opinion and to challenge the Special Counsel's view of the law in any subsequent enforcement action. Rights that may be exercised only by risking unemployment, however, are hollow things indeed.

The relevance of the Veterans Administration's action for today's decision is not that it renders this case or some other case justiciable; the justiciability of this case rests firmly on the threat of enforcement implicit in the Special Counsel's advisory opinion. The action's relevance is rather that it illustrates quite vividly the effective legal force of the Special Counsel's construction of the Hatch Act, which the court now refuses to allow federal employees to challenge without endangering their jobs. Because I believe that federal employees, like all citizens, ought not be required to jeopardize their livelihoods in order to vindicate their first amendment freedoms, I dissent.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 19

No. 84-5410

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES

v.

K. WILLIAM O'CONNOR, SPECIAL COUNSEL
MERIT SYSTEMS PROTECTION BOARD

And consolidated case no. 84-5414

[Filed Feb. 8, 1985]

Before: MIKVA, EDWARDS and GINSBURG, *Circuit Judges*

ORDER

Upon consideration of Appellants' joint Petition for Rehearing, filed January 14, 1985, it is

ORDERED, by the Court, that the aforesaid Petition is denied.

FOR THE COURT
GEORGE A. FISHER
Clerk

By: /s/ Robert A. Bonner
ROBERT A. BONNER
Chief Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 19

No. 84-5410

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES

v.

K. WILLIAM O'CONNOR, SPECIAL COUNSEL
MERIT SYSTEMS PROTECTION BOARD

And consolidated case no. 84-5414

[Filed Feb. 8, 1985]

Before: ROBINSON, *Chief Judge*, WRIGHT, TAMM, WALD, MIKVA, EDWARDS, GINSBURG, BORK, SCALIA and STARR, *Circuit Judges*

ORDER

Appellants' joint Suggestion for Rehearing *en banc*, filed January 14, 1985, has been circulated to the full Court and no member has requested the taking of a vote thereon. Upon consideration of the foregoing, it is

ORDERED, by the Court *en banc*, that the aforesaid Suggestion is denied.

FOR THE COURT
GEORGE A. FISHER
Clerk

By: /s/ Robert A. Bonner
ROBERT A. BONNER
Chief Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1984

Civil Action No. 84-00972

No. 84-5410

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO, *et al.*,
Appellants

v.

K. WILLIAM O'CONNOR, SPECIAL COUNSEL, MERIT SYSTEMS PROTECTION BOARD

Civil Action No. 84-00974

No. 84-5414

NATIONAL TREASURY EMPLOYEES UNION,
Appellant

v.

K. WILLIAM O'CONNOR, SPECIAL COUNSEL, MERIT SYSTEMS PROTECTION BOARD

[Filed Nov. 2, 1984]

Appeals from the United States District Court
for the District of Columbia

Before: MIKVA, EDWARDS, and GINSBURG, *Circuit Judges.*

JUDGMENT

These causes came on to be heard on the record on appeal from the United States District Court for the District of Columbia, and were argued by counsel. On consideration thereof, it is

ORDERED and ADJUDGED, by this Court, that the judgment of the District Court appealed from in these causes is hereby vacated and these cases are remanded with instructions to dismiss the unions' complaints for failure to present claims currently ripe for court adjudication, all in accordance with the Opinion for the Court filed herein this date.

Per Curiam
For The Court

/s/ George A. Fisher
GEORGE A. FISHER
Clerk

Date: November 2, 1984

Opinion for the Court filed by Circuit Judge Ginsburg.

Concurring Statement filed by Circuit Judge Edwards.

Dissenting Opinion filed by Circuit Judge Mikva.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Civil Action No. 84-0972

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO, *et al.*,
Plaintiffs,

v.

K. WILLIAM O'CONNOR,
Defendant.

NATIONAL TREASURY EMPLOYEES UNION,
Plaintiff,

v.

K. WILLIAM O'CONNOR,
Defendant.

[Filed Jun. 29, 1984]

MEMORANDUM AND ORDER

Former section 9(a) of the Hatch Act, now found at 5 U.S.C. § 7324(a)(2) (1982), prohibits federal employees from taking "an active part in political management or political campaigns." Plaintiffs in these consolidated actions, two national labor unions of employees of the federal government, a union local, and the local's president, challenge the application of that prohibition to certain allegedly "non-partisan" voter registration and

voter turnout campaigns they had planned to have their members conduct throughout this election year until they were warned by defendant that federal employees might be in violation of the Act by doing so. Defendant O'Connor is Special Counsel to the U.S. Merit Systems Protection Board ("MSPB"), charged with the investigation and prosecution of suspected violations of the Hatch Act before the MSPB, and the MSPB may suspend or dismiss federal employees found guilty of engaging in proscribed activities. 5 U.S.C. § 7325.

Plaintiffs pray that defendant's advisory legal opinion concerning the legality of their proposed activities, which he issued April 6, 1984, pursuant to 5 U.S.C. § 1206(l), in response to their query, be declared null and void. They say it misconstrues former section 9(a) of the Hatch Act, 5 U.S.C. § 7324(a)(2), and violates their rights under the First Amendment to the Constitution. They ask the Court to order the opinion withdrawn and to enjoin defendant from seeking enforcement of the Hatch Act against federal employees who engage in the "non-partisan" voter registration and voter turnout drives the unions plan to sponsor. The matter is now before the Court on plaintiffs' applications for summary preliminary and permanent injunctive relief, and defendant's cross-motion for summary judgment of dismissal. The material facts as hereinafter set forth are not in dispute, and for the reasons stated the applications for injunctive relief will be denied and judgment entered for defendant.

I.

In early March, 1984, one of defendant's staff attorneys wrote an advisory opinion letter in response to an inquiry by another union not involved here regarding the legality of the voter registration drives it intended to hold at government worksites. The letter stated the writer's opinion that federal employees "may participate in voter registration drives that are *not* identified with a political

party or a partisan candidate for public office," but the Hatch Act prohibits their taking part in union-sponsored voter registration drives if the union itself has endorsed a partisan candidate for public office. Such an endorsement "identifies" the union with the candidate's success, he said, and the union thus becomes a "partisan club for the duration of the campaign." The staff attorney's letter quickly acquired notoriety within the federal workforce and independently prompted these plaintiffs to file separate actions in this Court to vindicate their own impending voter registration activities.

The complaint of American Federation of Government Employees ("AFGE"), one of its affiliated locals, and the local's president, alleges that the union has endorsed a candidate for the Democratic nomination for President in 1984; that it also encourages its locals to conduct "non-partisan" voter registration drives; and that the March letter, emanating as it did from the Office of the Special Counsel, threatens its federal-employee members with the loss of their jobs if they participate. It sought an injunction prohibiting defendant "from enforcing or continuing in effect the holding of" the March letter.

The National Treasury Employees Union's ("NTEU") complaint alleges that it has endorsed partisan candidates for the presidency and the U.S. Senate and House of Representatives in 1984, and that it, too, desires to conduct "non-partisan" voter registration drives which the March letter inhibited by engendering fear on the part of members willing to help of "prosecution" for Hatch Act violations. NTEU asked for an injunction against defendant's "prosecuting plaintiff's members from [sic] engaging in nonpartisan voter registration and voter turnout activities."

Plaintiffs in both actions applied for temporary restraining orders. At hearing on March 30, 1984, the Court consolidated the actions with the consent of the

parties but declined to issue a restraining order, because the staff attorney's letter did not purport to address, and, thus, did not raise a justiciable controversy with respect to, plaintiffs' own activities. *See French* v. *Devine*, 547 F. Supp. 443, 446-47 (D.D.C. 1982). On April 2, 1984, therefore, the unions joined to request their own advisory opinion from Special Counsel. They acknowledged endorsing partisan candidates for office in 1984, but gave assurance that, in their "non-partisan" voter registration activities, "no attempt is made to solicit registrants on the basis of political party or candidate preference."

Defendant issued his opinion on April 6th. After examining the history of the Hatch Act's prohibition of political activity by federal employees, he concluded that participation in a voter registration drive *may* constitute partisan activity within the meaning of the Act. Turning to the few facts before him with respect to plaintiffs' registration drives, and their representations that no partisan solicitation of prospective registrants would be made, the Special Counsel asserted that "the absence of such 'solicitation' at a voter registration booth does not necessarily mean that the drive is not partisan; it is only one factor to be considered." Op. at 4. As to the candidate endorsements he said:

> By these endorsements the unions have become identified with the success of the endorsed candidates. If the voter registration drives are part of a campaign to enhance the electoral performance of your endorsed candidates, then employees may not participate because, under the Hatch Act, they "may not become prominently identified with any political movement, party or faction or with the success or failure of any candidate for election to public office." *Joseph S. Crawford*, 1 PAR 262, 263 (1946).
>
> Some other relevant factors might include other political activities of the sponsoring organization, the

> degree to which that organization has become identified with the success or failure of a partisan political candidate, issue or party, the nexus, if any, between the decision to undertake a voter registration drive and the other political objectives of the sponsor, whether particular groups are targeted for registration on the basis of their perceived political preference and the nature of publicity circulated to targets of the drive immediately prior to or during the drive. This is, of course, only a partial list of factors we might consider in determining whether a voter registration drive is a partisan political activity and whether the participation of covered employees in such a drive would be in violation of the Hatch Act. Given the increasing use of voter registration as a tool in partisan political campaigns, we cannot accept at face value your assertion that the drive you plan is "nonpartisan."

Id. at 5.

The Special Counsel observed that statements by national and local union officers (which plaintiffs do not repudiate) had stressed the important part played by these "non-partisan" voter registration drives in the unions' political strategies to elect partisan candidates whom they favored.[1]

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[1] For example, a June, 1982, memorandum from the then-president of NTEU to various chapter presidents states in part:

> In the 1982 election, voter registration will play an important factor in the campaigns of many friends of government workers. Because of low voter turnout, many of our allies were defeated in 1980. Congressmen and Senators, who have stood by us in the past, are now emphasizing the critical need of registering those who are eligible to vote and then urging them to vote.
>
> By aiding in voter registration efforts, NTEU members can markedly increase our influence in the political process. I

The Special Counsel's opinion concluded:

> Where, as here, the unions have endorsed partisan candidates, and where, as here, the unions have issued public statements and communications to their membership emphasizing the importance of voter registration in advancing the campaigns of candidates which the union support, the ineluctable conclusion must be that those voter registration drives sponsored or conducted by the unions are, in fact, partisan. Accordingly, we must advise you that participation by federal employees in your unions' voter registration drives is prohibited political activity within the definition of the Hatch Act.
>
> Of course, all federal employees, remain free to participate in truly nonpartisan registration drives.

Id. at 7.

Plaintiffs then renewed their applications for temporary restraining orders before this Court which it again denied but scheduled an expedited hearing on the motion for a preliminary injunction and consolidated it with the hear-

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urge every NTEU Chapter to undertake a voter registration campaign at your workplace and/or in your community.

An excerpt from the *NTEU Bulletin*, dated January 30, 1984, reads:

> Under the Hatch Act, a federal employee can: Register people to vote. This is considered a non-partisan activity, but because pro-worker candidates rely on high voter turnout for victory, voter registration is an essential part of their campaigns.

And a statement dated February, 1984, attributed to the president of an AFGE local and circulated to his members, declared:

> AFGE National leadership was not surprised by President Reagan's announcement to run for and seek a second term. The battle lines are drawn, and it is time to speak out! One way to "speak-out" is to vote. If you are not a registered voter please contact any of our stewards, and we will assist you with voter registration in this area.

ing on the merits pursuant to Fed. R. Civ. P. 65(a)(2). NTEU and the Special Counsel moved for summary judgment.

Plaintiffs stress that at the drives they have planned there will be no hortatory solicitation of votes, and no political propaganda, paraphernalia, or campaign literature dispensed. All prospective voters will be duly registered without regard to party persuasion or candidate preference. The gist of their claim is that so long as these sterile conditions are observed at the registration site, their voter registration activities must be deemed "non-partisan" under the Hatch Act, and the fact that the national unions have endorsed particular candidates or taken partisan positions in public is irrelevant. They read Special Counsel's opinion to hold that national unions' endorsements of party candidates necessarily confers a partisan taint to any voter registration drive sponsored by union members or locals, a construction which, they say, improperly expands prohibitions of the Hatch Act. Furthermore, they argue, the Special Counsel's concept of partisanship is at variance with the use of the term in the Federal Election Campaign Act.

Plaintiffs also contend that the Special Counsel's opinion is fraught with numerous constitutional infirmities. Its construction of the Hatch Act abridges the free speech rights of both the unions and the individual members, and burdens the rights of the unions to associate freely with their members, and of the members to associate freely with one another. Because there is no compelling government interest in prohibiting nonpartisan political activity, they say, the opinion is invalid under the First Amendment. And they also assert that it is, on its face, overbroad (because it prohibits both partisan and nonpartisan political activity) and vague (because it does not draw clear distinctions as to what is prohibited and what is not).

The Special Counsel disputes the merits of each of plaintiffs' contentions, but he initially maintains that judicial review of his advisory opinion is not presently in order.

II.

Defendant asks that the Court exercise its discretion to deny relief in these two cases, since the claims made, notwithstanding their putative First Amendment origins, should properly be heard and decided in the first instance by the MSPB in the context of an enforcement action, to be followed, if necessary, by review in a court of appeals, in accordance with the scheme envisioned by Congress for resolving such matters. Defendant points to no specific statutory provision which precludes pre-enforcement judicial intervention, but he contends that Congress' intent that the administrative process precede the judicial is implicit in the elaborate machinery which Congress has established to handle alleged Hatch Act violations. The process begins with the Special Counsel presenting a complaint detailing an alleged violation to the accused employee and the MSPB. 5 U.S.C. § 1206(g)(1). The employee then has a right to answer the complaint and present evidence to refute the charge, and he may be represented by an attorney in doing so. He also is entitled to a transcribed hearing before the MSPB or an administrative law judge, and must be given a written decision and the reasons therefor, including a copy of any final order imposing disciplinary action. 5 U.S.C. § 1207(a). If the employee becomes subject to a final order imposing disciplinary action, he may obtain judicial review in a court of appeals, 5 U.S.C. § 1207(c), which has the power to stay the order pending review. Fed. R. App. P. 18. This statutory process, insists defendant, evinces Congress' desire to develop, through the inherited and acquired wisdom of the MSPB, a uniform body of law interpreting the Hatch Act which militates against *ad hoc* pre-enforcement adjudications in district courts. Defend-

ant further argues that review of his opinion at this time would be premature, because the advisory opinion is not a "final agency action" in all respects ripe for judicial review. Only an MSPB final decision meets that description.

Plaintiffs reply that this case falls without the rationale of any theoretical exhaustion-of-remedies requirement, because they are not seeking to circumvent an ongoing administrative process or to avoid initiating such a process themselves. They point out that the federal employees they represent are placed in the dilemma of acceding to the Special Counsel's opinion, giving up *ex terrorem* their rights of political speech and association, or risking almost certain enforcement action against them, with the distinct possibility of losing their jobs if they are wrong. Since the staff attorney in the Office of Special Counsel issued the first advisory opinion plaintiffs have of caution abandoned all their plans for voter registration drives pending a decision by this Court. In such circumstances, they say, where important constitutional rights may be being irreparably harmed, the Special Counsel's advisory opinion is final enough agency action for the purpose of permitting them to go to court to test it.

These contentions, and the authorities the parties have cited to support them, invoke principles of both exhaustion of administrative remedies and ripeness (as well as ideas of finality, standing, and the existence of a justiciable case or controversy), in the abstract analytically distinct doctrines which in application often coincide with not altogether consistent results. *See, e.g., Abbott Laboratories* v. *Gardner*, 387 U.S. 136, 149-52 (1967); *Toilet Goods Association* v. *Gardner*, 387 U.S. 158, 165-66 (1967); *Gulf Oil Corp.* v. *United States Department of Energy*, 663 F.2d 296, 307 & n. 71, 310 (D.C. Cir. 1981).[2]

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[2] "Both ripeness and exhaustion deal with timing of judicial review; the ripeness focus is on the types of functions that courts

Exhaustion of administrative remedies is often required before seeking relief in court for an actual or threatened injury. *See, e.g., Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 50-51 (1938); *Andrade* v. *Lauer*, 729 F.2d 1475, 1484 (D.C. Cir. 1984); *Athlone Industries* v. *CPSC*, 707 F.2d 1485, 1488 (D.C. Cir. 1983). The requirement is not, however, generally treated as jurisdictional in nature but is to be applied in accordance with its purposes. *Andrade* v. *Lauer*, 729 F.2d at 1484. Exhaustion serves to discourage the flouting of agency authority and its processes; to enable the parties and the agency to develop the facts and produce a better record for review; to afford the agency opportunity to apply its expertise and to correct its own errors; and to promote judicial economy by preventing needless judicial fact-finding or resort to the court altogether if the agency functions to the satisfaction of all parties. *See Andrade* v. *Lauer*, 729 F.2d at 1485; *cf. Parisi* v. *Davidson*, 405 U.S. 34, 37-38 (1972); *McKart* v. *United States*, 395 U.S. 185, 193-95 (1969); *Athlone Industries* v. *CPSC*, 707 F.2d 1485, 1488 (D.C. Cir. 1983); *Gulf Oil Corp.* v. *United States Department of Energy*, 663 F.2d 296, 309 (D.C. Cir. 1981).

While each of these purposes might be served to some extent by awaiting the outcome of an MSPB enforcement proceeding here, as a practical matter these plaintiffs have no administrative remedies of their own to exhaust. They want to conduct their voter registrations now, yet Congress has provided them with no mechanism for administrative review of an advisory opinion of the Special Counsel.[3] All proceedings before the MSPB under the

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should perform, and the exhaustion focus is on the narrow question of how far a party must pursue an administrative remedy before going to court; the two often overlap." 4 K. Davis, Administrative Law Treatise § 25:1, at 350 (2d ed. 1983).

[3] The contrast with an "unlawful personnel practice" case demonstrates the proposition. In such a case the putative illegal action

Hatch Act are initiated by Special Counsel, and this he has neither done nor is obliged to do. The only way plaintiffs can obtain administrative consideration of their claims is to cause one or more of their federal-employee members to engage in conduct which the Special Counsel has pronounced illegal and, thus, bait him into an enforcement action.

Once begun enforcement might so enhance the virtues of the exhaustion requirement as to preclude resort to the court until it had finished. It could be said that a federal employee already in jeopardy is no worse off by being made to await the end of the MSPB proceedings. But it makes little sense here to fault the plaintiffs, or the federal employees they represent, for failing to do that which they cannot in fact do except by calling down upon the union members the punitive process for breaking a law they would prefer to obey if they can. Exhaustion is appropriate only when a complainant is realistically able to seek administrative relief simply by applying for it, or when the administrative process has already begun. When neither circumstance is present, as here, there still may be good reasons to question whether judicial review is proper, but those reasons are better considered in the context of ripeness, not exhaustion.

Defendant contends that the Special Counsel's opinion is not final agency action ripe for judicial review, because

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has been taken by the government (or an employee's superiors acting in official capacities as agents of the government), and the employee pursues redress at the agency level. Since an aggrieved *employee* himself may seek administrative relief, the exhaustion requirement is imposed. *See, e.g., Andrade* v. *Lauer*, 729 F.2d at 1484-93; *Carducci* v. *Regan*, 714 F.2d 171, 175 (D.C. Cir. 1983). Here the situation is the reverse: any illegal conduct is engaged in by the employee and the government then seeks to punish. Before an employee engages in such conduct, however, there is nothing he can do to obtain administrative review of an advisory opinion of the Special Counsel. Unions, of course, are not contemplated as proper parties to proceedings before the MSPB at all.

the MSPB alone has authority to "hear, adjudicate, . . . and . . . take final action" on Hatch Act matters, 5 U.S.C. § 1205(a)(1), and it has neither ratified the advisory opinion, nor has it taken, or threatened to take, any action against plaintiffs' members. Review would be proper, says defendant, were plaintiffs challenging a final order of the MSPB, *see* 5 U.S.C. § 1207(c), or the issuance of a regulation by the Office of Personnel Management ("OPM") interpreting the Hatch Act, *see Joseph* v. *United States Civil Service Commission*, 554 F.2d 1140, 1149-52 (D.C. Cir. 1977).[4] But the Special Counsel's opinion lacks the finality and "legal force" of either an OPM regulation or MSPB order, and, hence, is not ripe for review.

Neither of the two cases principally relied on by defendant, however, *W.E.B. DuBois Clubs* v. *Clark*, 389 U.S. 309 (1967) and *Dingess* v. *Hampton*, 305 F. Supp. 169 (D.D.C. 1969) (three-judge court), persuade the Court that this dispute is presently unripe for decision. In *DuBois Clubs* the Attorney General petitioned the Subversive Activities Control Board ("SACB") for an order (thus initiating administrative proceedings comparable to a Hatch Act enforcement proceeding here) that the W.E.B. DuBois Clubs of America was a Communist-front organization and, as such, required by statute to register with the Attorney General. Before any administrative hearings could be held, however, the Clubs brought suit against the Attorney General to declare the Communist-front registration provisions unconstitutional and enjoin their enforcement. Affirming dismissal of the complaint the Supreme Court observed the availability of the administrative process in which the Clubs could raise their constitutional claims and "decline[d] to require the court below to permit substitution of an injunctive proceeding

[4] OPM assumed from the now-abolished Civil Service Commission the task of promulgating regulations under the Hatch Act. These regulations are codified at 5 C.F.R. Part 733.

for the civil proceeding which Congress has specifically provided." *Id.* at 313. But in *DuBois Clubs* the administrative process had commenced (to enforce, it should be noted, a statute attaching consequences to conduct that had already occurred) and a dispositive decision of some sort was inevitable if not imminent. *DuBois Clubs* does not purport to foreclose judicial review of pre-emptive agency rulings which anticipate and abort a contemplated exercise of rights as effectively as a final administrative adjudication.

Dingess v. *Hampton* followed the holding of *DuBois Clubs* in a Hatch Act case which defendant claims is directly on point. Plaintiff, an employee of a federally-funded county government program, alleged that he had been, and intended to continue to be, actively engaged in partisan politics in violation of the Hatch Act.[5] Asserting that he must either forego politics or face the loss of his job, he brought suit in this court to obtain a declaration that the application of the Hatch Act to him violated his constitutional rights and an injunction prohibiting the Civil Service Commission from enforcing it against him.[6] While the suit was pending the Commission's general counsel investigated Dingess' activities, concluding that he had not violated the Act and that no action would be taken against him. The court (McGowan, J.) dismissed the complaint, finding the situation "not unlike" that in *Dubois Clubs* where it had been argued that the "mere overhanging threat of an administrative proceeding, or the burden of going through with it once begun, has a chilling effect upon First Amend-

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[5] The Hatch Act was made applicable to employees of state and local agencies paid with federal funds. *See Dingess*, 305 F. Supp. at 170.

[6] Dingess would have incurred administrative prosecution virtually identical to that which takes place before the MSPB except that it would have been before the Civil Service Commission, the MSPB's predecessor agency in the enforcement of the Hatch Act.

ment freedoms of speech and association which vests a court with jurisdiction to intrude itself before the Congressional plan of proceeding is either invoked or has run its course." 305 F. Supp. at 173. The court said:

> We do not think the mere fact that a constitutional objection to an Act of Congress is derived from the First Amendment automatically and invariably means that a court must resolve the issue in advance, and without the benefit, of the operation of the specific processes provided by Congress for the enforcement of the statute.

305 F. Supp. at 174.

Dingess is, however, distinguishable from the case at bar. The plaintiff in *Dingess* wanted to litigate whether the Hatch Act applied to him despite counsel's opinion that his activities were innocent and no action was to be taken against him.[7] In contrast plaintiffs here have been told by the official authorized to charge federal employees with violations of the Act that for their members to participate in their voter registration drives would be unlawful, and they have been given no reason to think that if they go ahead with them as planned he will change his mind about them or not do his duty as he now sees it. Given what appears to be the inevitability

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[7] The *Dingess* court also noted the irony of plaintiff's claims:

> Plaintiff's curious insistence that he has violated the Act no matter what the Commission says seems at odds with his allegations of the critical importance to him of his job. His equally emphatic allegations that he proposes to go on violating the Act are also at apparent cross purposes with his argument founded upon the chilling effect of the Hatch Act. What is clear is that plaintiff disagrees with the policy considerations underlying the Congressional decision to extend the Hatch Act to the operations employees of the poverty program, and that he wants a nullification of that legislative judgment by the most expeditious means.

305 F. Supp. at 173 n. 5.

of the confrontation, any incentive to require union members to place their careers at hazard simply to learn if the Hatch Act applies as Special Counsel says it does is attenuated.

Indeed, more recent court challenges to the application of the Hatch Act have been permitted even though actual enforcement proceedings had not been completed, or even commenced.[8] In 1973, the Supreme Court decided the constitutionality of the Hatch Act's prohibition of certain political activity in a suit by plaintiffs who wished to engage in it and alleged that the Civil Service Commission "was enforcing, or threatening to enforce," its provisions against them, of whom only one had already violated the Act and none were yet the subjects of Commission proceedings. *Civil Service Commission* v. *National Association of Letter Carriers*, 413 U.S. 548, 551 & n. 3 (1973).

Plaintiffs primarily rely on a Hatch Act decision of the court of appeals postdating *Dingess* in which the claims were held ripe for pre-enforcement review. *Joseph* v. *United States Civil Service Commission*, 554 F.2d 1140 (D.C. Cir. 1977), involved a challenge to a Civil Service Commission regulation exempting participation in political campaigns as or on behalf of an independent candidate for an otherwise partisan election for local office in the District of Columbia from the strictures of the Hatch Act. The district court granted summary judgment in favor of the Commission, and on appeal the Commission argued both the merits and for dismissal because the case was not ripe for adjudication. Noting that "modern case law . . . reflects a greater judicial willingness to aid litigants faced with the necessity of risking substantial harm in order to challenge the validity of government action," 554 F.2d at 1151, the court

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[8] Another judge of this court reached the merits of a suit in a procedural posture identical to this case, and despite the defendant's express reliance on *Dingess*. *See French* v. *Devine*, 547 F. Supp. 443, 447-49 (D.D.C. 1982).

said, "[i]f this suit is dismissed, their own avenue for redress . . . is to violate the Hatch Act and run the risk of losing their jobs." *Id.* at 1152.

Although there were reasons favoring judicial review in *Joseph* not presented here,[9] its holding is sufficient to dissuade the Court from following *Dingess* to dismiss the instant complaints on ripeness grounds. If, in a case like *Joseph*, review of the validity of a regulation is possible before it is enforced if its promulgation imposes "debilitating uncertainties" on the regulated parties,[10] so also should pre-enforcement review be available of a threat of enforcement which has the effect of deterring the exercise of constitutional rights. *See, e.g., Steffel* v. *Thompson*, 415 U.S. 452, 462 (1974); *Andrade* v. *Lauer*, 729 F.2d 1475, 1483 (D.C. Cir. 1984); *Kaplan* v. *Hess*, 694 F.2d 847, 850-51 (D.C. Cir. 1982).

Special Counsel's advisory opinion here, even though lacking coercive legal effect, creates an onerous legal uncertainty and is tantamount to a threat of enforcement. It was issued, pursuant to a statutory grant of

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[9] The principal plaintiff, a partisan candidate for office in the District of Columbia, was not a federal employee but was nonetheless aggrieved by the regulation because it allowed federal workers to assist his nonpartisan opponents. He would have been deprived of any forum in which to seek redress. Moreover, even a federal employee could not raise, in defense of a charge of engaging in clearly prohibited activity, the issue of the validity of an exemption from the Hatch Act of some other activity. 554 F.2d at 1550-51.

Other plaintiffs were elected members of the D.C. City Council who were members of the Republican or Democratic parties; federal employees who would have liked to campaign for partisan D.C. City Council candidates; and one who was interested in both obtaining federal employment and in campaigning for partisan candidates. The court found that all but the last person had standing to sue. *Id.* at 1145-49.

[10] 4 K. Davis, Administrative Law Treatise § 25:16 at 411 (2d ed. 1983). *See Abbott Laboratories*, 387 U.S. at 152-53; *Andrade* v. *Lauer*, 729 F.2d at 1483; *Continental Air Lines, Inc.* v. *CAB*, 522 F.2d 107, 128 (D.C. Cir. 1974).

power, by the very person charged with initiating the enforcement process, and as an authoritative statement regarding the legality of these specific plaintiffs' planned conduct under the Hatch Act. It contemplated, and had the likely consequence of, "expected conformity," *see National Automatic Laundry and Cleaning Council*, 443 F.2d 689, 698 (D.C. Cir. 1971), and the history of plaintiffs' response to it attests to its practical effect in that regard. Plaintiffs are therefore entitled to seek review of it without further delay.

III.

Plaintiffs' claims on the merits present three basic questions: whether Special Counsel's opinion is consistent with the Hatch Act; whether its construction of the Hatch Act is unconstitutional as applied to plaintiffs' activities; and whether the opinion is unconstitutional on its face. Before reaching those issues, however, the defendant urges the Court to undertake a more limited inquiry, viz., whether the opinion's construction of the Hatch Act is within the "outer limits" of certain rules incorporated by reference in the Hatch Act in 1940.[11]

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[11] Section 9(a) of the Act was passed in 1939. Pub. L. No. 76-252, § 9(a), 53 Stat. 1147, 1148. It prohibited, *inter alia*, employees of the executive branch of the federal government from taking "any active part in political mangement or in political campaigns," the prohibition now found in 5 U.S.C. § 7324(a)(2). A 1940 amendment, Pub. L. No. 76-753, § 4, 54 Stat. 767, 769, added to the Act § 15, stating that § 9(a) proscribed "the same activities on the part of such persons as the United States Civil Service Commission has heretofore determined are at the time this section takes effect prohibited on the part of [federal employees] by provisions of the civil-service rules prohibiting such employees from taking any active part in political management or in political campaigns." Those rules forbade, *inter alia*, "helping to get out the voters on registration and election days." United States Civil Service Commission Form 1236, Political Activity and Assessments, September 1939, § 20 (reprinted as an appendix to the opinion in *Civil Service Commission* v. *National Association of Letter Carriers*, 413 U.S. 548, 586.)

He argues that to the extent his advisory opinion falls within those limits, it must be accepted as an authoritative statement of the reach of the Hatch Act and upheld against First Amendment attack.

But in *Civil Service Commission* v. *National Association of Letter Carriers*, 413 U.S. 548 (1973), the Supreme Court held that the reach of the Hatch Act was *limited* by the 1940 rules, not that it was congruent with them, nor that the division between permissible and impermissible conduct would remain static. Indeed, by further regulations and adjudications within those bounds, the Civil Service Commission was to produce "a more refined definition of what conduct would or would not violate the statutory prohibition of taking an active part in political management and political campaigns." 413 U.S. at 575. To determine whether the Special Counsel's opinion properly construes the Act, therefore, the Court should proceed not by examining the law as it stood in 1940, but as it stands today.

Section 7324(a)(2) simply proscribes taking "an active part in political management or political campaigns." The Court in *Letter Carriers* reaffirmed the basic holding of *United Public Workers* v. *Mitchell*, 330 U.S. 75 (1947), that this prohibition, when limited to partisan political activity, is within Congress' constitutional power. The Court reiterated *Mitchell's* limiting construction:

> It was "only partisan political activity that is interdicted . . . . [Only] active participation in political management and political campaigns [is proscribed]. Expressions, public or private, on public affairs, personalities and matters of public interest, not an objective of party action, are unrestricted so long as the government employee does not direct his activities toward party success."

413 U.S. at 556 (quoting *Mitchell*, 330 U.S. at 100).

But the available evidence in the statute and its history, the regulations, and prior administrative adjudications

demonstrate no more that what all the parties concede—that *partisan* voter registration drives constitute prohibited activity under the Act—and leaves unanswered the central question here, namely, if the Special Counsel could (and properly did) find plaintiffs' voter registration drives so imbued with partisan character as to declare them off limits to federal employees. Partisanship, it appears, may be in the eye of the beholder,[12] but the Supreme Court's review of the purposes of the Hatch Act is of value in determining when it can be described.

In the *Letter Carriers* case the Court noted that "the government has an interest in regulating the conduct and 'the speech of its employees that differ[s] significantly from those it possesses in connection with regulation of the speech of the citizenry in general.'" 413 U.S. at 564 (quoting *Pickering* v. *Board of Education*, 391 U.S. 563, 568 (1968)). Referring to the legislative history of the Act, the Court then explained the "obviously important interests sought to be served by the limitations on partisan political activities now contained in the Hatch Act." 413 U.S. at 564. First was that federal employees should execute the laws impartially, "in accordance with the will of Congress, rather than in accordance with their own or the will of a political party." *Id.* at 564-65. To this was added the importance of appearing impartial, so as not to erode public confidence in the government. *Id.* at 565. A further major reason was to prevent federal workers

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[12] In *Clarence M. Fitzwilliam*, 1 PAR 77, 80 (1945), the Civil Service Commission rejected a defense that a drive was nonpartisan: "A movement organized or unorganized, to get voters registered might be non-partisan; but this one was not." The employee charged with violating the Act had allowed his office to be used for a meeting to plan a voter registration drive. The Commission, in holding the subject of the meeting to be partisan, stressed that even though witnesses said that "there was no proposal to register Democrats in particular but 'just citizens generally,'" party leaders were heading the undertaking, and "party advantage seems to be clearly an object."

from being employed to build a "powerful, invincible, and perhaps corrupt political machine." *Id.* The Hatch Act raised "substantial barriers . . . against the party in power—or the party out of power, for that matter—using the thousands or hundreds of thousands of federal employees, paid for at public expense, to man its political structure and political campaigns." *Id.* at 565-66. Related to this was an effort "to further serve the goal that employment and advancement in the Government service not depend on political performance, and at the same time to make sure that Government employees would be free from pressure and from express or tacit invitation to vote in a certain way or perform political chores in order to curry favor with their superiors rather than to act out their own beliefs." *Id.* at 566.

Tested by those purposes, the Special Counsel's analysis is entirely appropriate. To adopt plaintiffs' position—that their drives are necessarily non-partisan simply because prospective voters are registered without being importuned—would ignore the realities of modern political campaigning and revive the ancient specter of a civil service with debts to pay or collect.

Apart from public statements of the unions and their leaders, it is obvious that plaintiffs have partisan reasons for organizing and conducting their voter registration drives, even though they may not, at the instant of registration, openly court the vote. The very urgency with which they have pressed this litigation reveals the extent to which they envision voter registration as an integral part of their political strategies and not merely as a benovelent community service as, for example, a charity fundraiser or a Labor Day observance. And the extent to which the case has been treated as such by the Court (including its willingness to reach the merits when restraint might have been more prudent) is in direct proportion to importance claimed for it by plaintiffs as a First Amendment political right of the highest order.

The Court need not inquire into the efficacy of the drives in accomplishing their sponsors' goals. When advancement of a partisan cause is an object, the purposes of the Hatch Act are served by proscribing participation by federal employees. The partisan evils which voter registration drives may breed do not all occur at the registration table: civil servants may face subtle or overt pressure to assist in conducting those drives, not to mention registering for a certain party themselves and voting as the union would wish them to.

Plaintiffs' restricted definition of partisan activity—focusing as it does solely on how the registration itself is conducted—ignores a whole dimension of the Hatch Act. Participation in the drives may be proscribed, consistent with the purposes of the Hatch Act, not just because the ends of the activity are pernicious, but because the activity itself possesses such potential for pernicious political conduct. Unions of federal employees may be as entitled to take partisan political positions as other unions, and they may certainly conduct voter registration drives, but they cannot do both at the same time if the twain are so closely related as they appear to be in this case. The Special Counsel's opinion does not broaden the Hatch Act beyond that which Congress intended. It is fully in harmony with it.

Plaintiffs make the further argument, that under the Federal Election Campaign Act of 1971, as amended ("FECA"), 2 U.S.C. §§ 431 *et seq.* (1982), and its implementing regulations, unions generically are allowed to engage in voter registration drives, which are generically tolerated as innocuous unless "assistance in registering or voting [is] withheld or refused on a partisan basis . . . ." 11 C.F.R. § 114.3(c)(4) (1983). Be that as it may, the Court is not persuaded that the provisions of the FECA dictate a different interpretation of the Hatch Act.

That a labor union may, under FECA, engage in an activity says nothing about whether a federal employee

may, under the Hatch Act, participate in the same activity sponsored by his or her union. The election statutes apply to all unions, whether or not they have federal workers as members, and the more specific provisions of the Hatch Act control over the more general provisions of FECA.[13] Furthermore, that an activity is not so "partisan" as to be proscribed by FECA or the regulations thereunder says nothing about its status under the Hatch Act. The two statutes were passed at different times, are directed at different afflictions of the electoral process, and have different purposes; there is no reason to conclude that they allow the same degree of "partisanship" in the political activities with which they are respectively concerned.[14] Lacking any showing of congressional intent that the two statutes are to be construed together, the Court declines the invitation to do so on its own.

IV.

Plaintiffs' penultimate argument is that Special Counsel's opinion, on its face, is fatally overbroad, reaching too far into areas of protected speech and associational rights. They point out that many of the elections in

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[13] Under FECA, unions are prohibited from making "a contribution or expenditure in connection with" a federal election, 2 U.S.C. § 441b(a); exempted, however, from the definition of "contribution or expenditure" are "communications" by a labor union to its members and their families on any subject. 2 U.S.C. § 441b(b)(2). One such form of "communication" with its members and their families in which unions in general may engage is "partisan" registration and get-out-the-vote drives, 11 C.F.R. § 114.3(c)(4) (1983), which, plaintiffs concede, is plainly prohibited in the case of federal employee unions by the Hatch Act.

[14] The purpose of the prohibition on union "contributions or expenditures," *see supra* n. 13, is to prevent union funds from being used to influence the public at large to vote for a certain candidate or party and to promote the responsibility of individual citizens for democratic government. *See, e.g., United States* v. *International Union United Auto Workers*, 352 U.S. 567, 570-84 (1957).

which their newly-registered voters will vote are without any partisan significance whatsoever. Moreover, they submit, although the national offices of the unions may have endorsed a particular candidate, union locals (or some of them at least) have not, and it is the locals which actually organize and conduct the drives, not the national headquarters. The assertion is belied, however, by plaintiffs' allegations that, because of Special Counsel's opinion, it is they—the national unions—which have to stop planning for any future drives, training local officials in how to conduct them, and encouraging their national memberships to get involved. And the statements by or attributed to the national unions demonstrate the intimate nexus between the locals' voter registration drives and the national unions' political aspirations. If that nexus were refuted by a clear showing of autonomy on the part of a particular local's registration activities, then participation by federal employees might occur with impunity, assuming, of course, that the local itself remained uncommitted. Absent that showing, and in light of the unions' uttterances of record before him, the Special Counsel's conclusion that the drives that these plaintiffs intend to conduct are both partisan in nature and originate at union headquarters is not unfounded, whatever might be the evidence in some other case not yet presented to him.

Plaintiffs insist that the advisory opinion is also overbroad because a less sweeping rule—prohibiting coercion of union members as well as partisan solicitation of voters —would accomplish the purposes of the Hatch Act without forcing the unions to abandon either their political objectives or their registration drives altogether. But this very conclusion was rejected by the Court in the *Letter Carriers* case:

> It may be urged that prohibitions against coercion are sufficient protection; but for many years the joint judgment of the Executive and Congress has

> been that to protect the rights of federal employees with respect to their jobs and their political acts and beliefs it is not enough merely to forbid one employee to attempt to influence or coerce another. . . . Perhaps Congress at some time will come to a different view of the realities of political life and Government service; but that is its current view of the matter, and we are not now in any position to dispute it. Nor, in our view, does the Constitution forbid it.

413 U.S. at 566-67 (footnote omitted). A broader prophylactic rule, which anticipates problems before they actually arise, is not impermissible, even in a First Amendment context. *California* v. *LaRue*, 409 U.S. 109, 116 (1972); *see also Williamson* v. *Lee Optical Co.*, 348 U.S. 483, 487-88 (1955); *Cutts* v. *Fowler*, 692 F.2d 138, 141 (D.C. Cir. 1982).

Plaintiffs contend, at the last, that the Special Counsel's opinion is unconstitutionally vague. They suggest that federal employees have no way of knowing what the Special Counsel regards as prohibited activity: his reasoning, if extrapolated, might anathematize a wide variety of activities conducted by any number of organizations to which a federal employee might belong. But the Special Counsel's opinion is, in large part, a product of plaintiffs' request. He confined himself to the facts before him and expressed no opinion regarding other hypothetical situations which might arise in the course of applying a statute as broad as the Hatch Act. At the same time, he could tailor his opinion only as narrowly as plaintiffs' request would allow. Because he was given few facts and was not advised of others—such as the purported autonomy of the locals—which might have permitted a narrower ruling, the problem is one of plaintiffs' making. Should they desire clarification, they are free to supply the Special Counsel with more information and ask him to elaborate.

For the foregoing reasons the Court finds that the advisory opinion of the Special Counsel does not contravene the Hatch Act and is not unconstitutional. Accordingly, it is, this 29th day of June, 1984,

ORDERED, that the motions of plaintiffs for summary judgment and for preliminary and permanent injunctive relief are denied; and it is

FURTHER ORDERED, that the motion of defendant for summary judgment is granted, and the complaints are dismissed with prejudice.

/s/ Thomas Penfield Jackson
THOMAS PENFIELD JACKSON
U.S. District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Civil Action No. 84-0972

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO, *et al.*,
Plaintiffs,

v.

K. WILLIAM O'CONNOR,
Defendant.

NATIONAL TREASURY EMPLOYEES UNION,
Plaintiff,

v.

K. WILLIAM O'CONNOR,
Defendant.

[Filed Mar. 5, 1985]

ORDER

In accordance with *American Federation of Government Employees* v. *O'Connor*, 747 F.2d 748 (D.C. Cir. 1984), it is, this 5th day of March, 1985,

ORDERED, that plaintiffs' complaints are hereby dismissed for lack of subject matter jurisdiction pursuant to Fed.R.Civ.P. 12(b)(1) for failure to present claims ripe for judicial determination.

/s/ Thomas Penfield Jackson
THOMAS PENFIELD JACKSON
U.S. District Judge

APPENDIX C

OFFICE OF THE SPECIAL COUNSEL

April 6, 1984

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National Treasury Employees Union
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Washington, D.C. 20006

Mark D. Roth, Esq.
Acting General Counsel
American Federation of Government
Employees, AFL-CIO
1325 Massachusetts Avenue, N.W.
Washington, D.C. 20005

Dear Ms. Williams and Mr. Roth:

This is in response to your joint letter of April 2, 1984, in which you asked for an advisory opinion under 5 U.S.C. § 1206(1) on whether certain planned activity will violate the Hatch Act. Specifically, you stated that both the National Treasury Employees Union (NTEU) and the American Federation of Government Employees (AFGE) have "endorsed a candidate for the presidency in 1984." You further state that, "Both unions . . . are now engaged, through our locals and chapters, in non-partisan voter registration activity at worksites across the country." The only information you submitted with regard to the "nonpartisan" nature of this activity is that "no attempt is made to solicit registrants on the basis of political party or candidate preference."

Because of the paucity of information in your letter, and in order to give a thorough response to your request,

I have taken into consideration the material filed with the district court last week in support of your complaint for injunctive relief against this office, as well as other material in our files. Since this letter is advisory in nature, we have not conducted any investigation into your activity but have relied solely on available information.

Section 9(a) of the Hatch Act, now codified at 5 U.S.C. § 7324(a)(2), prohibits federal employees from taking "an active part in political management or political campaigns." This prohibition has not changed since its enactment in 1940. The Act has withstood numerous constitutional challenges, and the courts have reaffirmed that it is a legitimate exercise of the legislative power to institute a fundamental public policy: "that federal service should depend upon meritorious performance rather than political service, and that the political influence of federal employees on others and on the electoral process should be limited." *United States Civil Service Comm'n v. National Ass'n of Letter Carriers*, 413 U.S. 555, 557 (1973); *United Public Workers v. Mitchell*, 330 U.S. 75, 96-97 (1947). Stated another way, "[p]artisan political activities by federal employees must be limited if the government is to operate effectively and fairly, elections are to play their proper part in representative government, and employees themselves are to be sufficiently free from improper influences." *National Ass'n of Letter Carriers*, 413 U.S. at 564. The Act strikes a balance between the interests of an employee as a citizen and the government's interest in the efficient, impartial administration of laws, one not dissimilar to that struck when public servants exercise First Amendment rights in other circumstances. *Id.*; *United Public Workers*, 330 U.S. at 96; *cf. Connick v. Meyers*, 103 S.Ct. 1684, 1687 (1984); *Pickering v. Board of Education*, 391 U.S. 563, 568 (1968). The ban of the Act is not on the expression of individual opinion but on the translation of that expression into activity in a political campaign.

Congress did not formulate a definition of what constituted taking "an active part in political management or political campaigns." Instead it defined this activity as "those acts of political management or political campaigning which were prohibited on the part of employees in the competitive service before July 19, 1940, by determination of the Civil Service Commission under rules prescribed by the President." 5 U.S.C. § 7324(a). The Act essentially extended the Commission's determinations to cover all employees with certain specified exceptions. *Id.* (c) & (d). It expressly preserves the employee's "right to vote as he chooses and to express his opinion on political subjects and candidates." *Id.* at (b).

The Act's definition of political management and campaigning was directly challenged on grounds of vagueness in *National Ass'n of Letter Carriers, supra.* In upholding the Act, the Supreme Court recognized that it was difficult to find the actual determinations of the Civil Service Commission. However, the Court ruled that in adopting this definition, Congress relied on the codification of these determinations contained in Civil Service Form 1236 of September 1939. "It was this administrative restatement of . . . law, modified to the extent necessary to reflect the provisions of the 1939 and 1940 Acts themselves, that, in our view, Congress intended to serve as its definition of the general proscription against partisan activities." *Id.* at 573-74. We are required, therefore, to look to that administrative restatement to determine whether the proposed activity was of the type Congress intended to proscribe.

Form 1236 is readily available; it was published as an appendix to the opinion in *National Ass'n of Letter Carriers,* 413 U.S. at 581-95. That restatement of administrative law expressly provides, "It is the duty of an employee to avoid any offensive activity at primary and regular elections. He must refrain from . . . helping to get out the voters on registration . . . days . . . ."

C.S. Form 1236, Political Activities and Assessments at § 20 (Sept. 1939). Although the quoted language appears to be a total ban on participation in all voter registration drives, partisan and nonpartisan, the Supreme Court has made it clear that Congress intended the proscriptions apply only to partisan activities. *National Ass'n of Letter Carriers*, 413 U.S. at 564.

Subsequent to passage of the Act, the Civil Service Commission again had occasion to rule that voter registration drives could constitute "offensive activity." In *Clarence M. Fitzwilliam*, 1 PAR 77 (1945),* the Commission was considering whether an employee had violated the Hatch Act by becoming active in a voter registration drive. Although the Commission ultimately decided that Fitzwilliam did not participate in the drive, it first rejected the defense that the voter registration drive was nonpartisan:

> In the evidence adduced by the respondent, stress was laid upon the object of the meetings held in Mr. Fitzwilliam's office. Witnesses emphasized that there was no proposal to register Democrats in particular but "just citizens generally." Two witnesses were asked on cross examination whether they did not, nevertheless, consider the meetings political. One replied, and reiterated, that he did not (although he conceded that it was not "just a coincidence" that only Democrats were present); and the other avoided an unequivocal answer. The "first line of defense," obviously was that the whole enterprise was nonpolitical. On this point, we find against the defense.

---

* Citations to "PAR" are to the Political Activity Reporter, an official compilation of the decisions of the Civil Service Commission. Under the Civil Service Reform Act of 1978, the adjudicatory and prosecutorial responsibilities of the Commission passed to the Merit Systems Protection Board and its Special Counsel, respectively. 5 U.S.C. §§ 1206(2)(A), (g)(1), 1207, 7325.

> *A movement organized or unorganized, to get voters registered might be non-partisan; but this one was not.* When a party county chairman, and another party leader such as Mr. Riddle, head an undertaking such as is disclosed by the evidence in this case, party advantage seems to be clearly an object. We find that the gatherings in question were political.

Id. at 80 (emphasis added); *accord, George A. Brown*, 1 PAR 231 (1946).

We recognize that current regulations of the Office of Personnel Management contain a list of activities prohibited by the Hatch Act and that this list does not include partisan voter registration drives. 5 C.F.R. § 733.122(b). It must be noted first that the introductory language to this list expressly identifies it as only a partial list of proscribed activities. *Id.* There is nothing inconsistent between the regulations and the Commission's earlier determinations that federal employees are forbidden to take part in partisan voter registration campaigns.

The determination of whether a voter registration drive is a political campaign activity must be made from the available evidence. Although you state that, "no attempt is made to solicit registrants on the basis of political party or candidate preference," the absence of such "solicitation" at a voter registration information booth does not necessarily mean that the drive is not partisan; it is only one factor to be considered.

In your letter you state your unions have endorsed a presidential candidate in the election this year. From the papers filed in court, it appears that they have also endorsed candidates for the Senate and House of Representatives. Affidavit of Robert M. Tobias (Mar. 27, 1984). By these endorsements the unions have become identified with the success of the endorsed candidates. If the voter registration drives are part of a campaign

to enhance the electoral performance of your endorsed candidates, then employees may not participate because under the Hatch Act, they "may not become prominently identified with any political movement, party or faction or with the success or failure of any candidate for election to public office." *Joseph S. Crawford*, 1 PAR 262, 263 (1946).

Some other relevant factors might include other political activities of the sponsoring organization, the degree to which that organization has become identified with the success or failure of a partisan political candidate, issue or party, the nexus, if any, between the decision to undertake a voter registration drive and the other political objectives of the sponsor, whether particular groups are targeted for registration on the basis of their perceived political preference and the nature of publicity circulated to targets of the drive immediately prior to or during the drive. This is, of course, only a partial list of factors we might consider in determining whether a voter registrdation drive is a partisan political activity and whether the participation of covered employees in such a drive would be in violation of the Hatch Act. Given the increasing use of voter registration as a tool in partisan political campaigns, we cannot accept at face value your assertion that the drive you plan is "nonpartisan."

The fact that the employee's political activity occurs under the auspices of a labor organization is irrelevant. Membership in a labor union neither increases nor decreases the employees First Amendment rights. The limitations on the exercise of those rights by federal employeees under the Hatch Act must be determined under that Act and not under the provisions of the Federal Labor Relations Act or the Federal Election Campaign Act of 1971. The Civil Service Commission in one of its seminal decisions, *George D. Hardman*, 1 PAR 335 (1948), addressed this issue when it stated:

> Mr. Hardman contended that legitimate labor union activities were being fictitiously dressed and paraded as political activities. As we said in our last edition of Form 1236 (Sec. 18); "Membership in a labor union by employees subject to the Hatch Act is not prohibited" (an assertion so obvious as scarcely to require statement). Furthermore, the fact that a labor union engages in political activity does not of itself make an individual member responsible. This also is obviously true, since there is no denial of the right to inactive membership even in a political club. But individual political activity within a union is as much a violation of law as the same activity anywhere else. To quote again from Form 1236 (Sec. 12) "Political activity in fact, regardless of the method or means used by the employee, constitutes a violation."

Id. at 324.

The material available to us indicates that your voter registration drives have become adjuncts to the political campaign activities of your unions. For example, another paper filed with the court is a memorandum dated June 21, 1982, to IRS Chapter Presidents from Vincent L. Connery, then president of NTEU. This memorandum states, in part:

> In the 1982 election, voter registration will play an important factor in the campaigns of many friends of government workers. Because of low voter turnout, many of our allies were defeated in 1980. Congressmen and Senators, who have stood by us in the past, are now emphasizing the critical need of registering those who are eligible to vote and then urging them to vote.
>
> By aiding in voter registration efforts, NTEU members can markedly increase our influence in the political process. I urge every NTEU Chapter to

undertake a voter registration campaign at your workplace and/or in your community.

Also filed with the court is an extract from *The NTEU Bulletin*, which includes the following statement:

> Under the Hatch Act, a federal employee can:
>
> Register people to vote. This is considered a non-partisan activity, but because pro-worker candidates rely on high voter turnout for victory, voter registrationtion is an essential part of their campaigns.

The NTEU Bulletin at 4 (Jan. 30, 1984). Our files contain a similar document dated February 1984 and circulated by Bruce C. Ransom, Jr., president of AFGE Local 3615 (copy attached). Mr. Ransom states:

> AFGE National leadership was not surprised by President Reagan's announcement to run for and seek a second term. The battle lines are drawn, and it is time to speak out! One way to "speak-out" is to vote. If you are not a registered voter please contact any of our stewards, and we will assist you with voter registration in this area.
>
> We received some recent comments on the "disappearing pay raise", and with more Reaganomics in the future, watch out!

Where, as here, the unions have endorsed partisan candidates, and where, as here, the unions have issued public statements and communications to their membership emphasizing the importance of voter registration in advancing the campaigns of candidates which the unions support, the ineluctable conclusion must be that those voter registration drives sponsored or conducted by the unions are, in fact, partisan. Accordingly, we must advise you that participation by federal employees in your unions' voter registration drives is prohibited political activity within the definition of the Hatch Act.

Of course, all federal employees, remain free to participate in truly nonpartisan registration drives.

Sincerely,

/s/ K. William O'Connor
K. WILLIAM O'CONNOR

Enclosure

KWOC:SJM/gdj

THE LOCAL VOICE
of 3615
Social Security Administration
Office of Hearings and Appeals
P.O. Box 147 Arlington, VA 22210

FEBRUARY 1984

President's Page

AFGE National leadership was not surprised by President Reagan's announcement to run for and seek a second term. The battle lines are drawn, and it is time to speak out! One way to "speak-out" is to vote. If you are not a registered voter please contact any of our stewards, and we will assist you with voter registration in this area.

We received some recent comments on the "disappearing pay raise", and with more Reaganomics in the future, watch out!

I am happy to report that as Local 3615 enters its ninth year of representing OHA Central Office employees that we have an excellent track record. Our officers and stewards have been fully-trained and are knowledgeable of your rights under the contract and CSRA. Recently, an arbitrator was very pleased with one of our steward's presentation of a complicated grievance. We need your support—don't wait until you have a personnel problem— Join Now!

/s/ Bruce C. Ransom, Jr.
BRUCE C. RANSOM, JR.
President

APPENDIX D

5 U.S.C. 7324 provides in pertinent part:

> (a) An employee in an Executive agency or an individual employed by the government of the District of Columbia may not—
>
> (1) use his official authority or influence for the purpose of interfering with or affecting the result of an election; or
>
> (2) take an active part in political management or in political compaigns.
>
> For the purpose of this subsection, the phrase "an active part in political management or in political campaigns" means those acts of political management or political campaigning which were prohibited on the part of employees in the competitive service before July 19, 1940, by determinations of the Civil Service Commission under the rules prescribed by the President.
>
> (b) An employee or individual to whom subsetion (a) of this section applies retains the right to vote as he chooses and to express his opinion on political subjects and candidates.

5 U.S.C. 7325 provides:

> An employee or individual who violates section 7324 of this title shall be removed from his position, and funds appropriated for the position from which removed thereafter may not be used to pay the employee or individual. However, if the Merit Systems Protection Board finds by unanimous vote that the violation does not warrant removal, a penalty of not less than 30 days' suspension without pay shall be imposed by direction of the Board.

5 U.S.C. 1206 provides in pertinent part:

(e) (1) In addition to the authority otherwise provides in this section, the Special Counsel shall, except as provided in paragraph (2) of this subsection, conduct an investigation of any allegation concerning—

(A) political activity prohibited under subchapter III of chapter 73 of this title, relating to political activities by Federal employees;

(B) political activity prohibited under chapter 15 of this title, relating to political activities by certain State and local officers and employees;

(C) arbitrary or capricious withholding of information prohibited under section 552 of this title, except that the Special Counsel shall make no investigation under this subsection of any withholding of foreign intelligence or counterintelligence information the disclosure of which is specifically prohibited by law or by Executive order.

(D) activities prohibited by any civil service activity relating to political intrusion in personnel decisionmaking; and

(E) involvement by any employee in any prohibited discrimination found by any court or appropriate administrative authority to have occurred in the course of any personnel action.

* * * *

(g) (1) Except as provided in paragraph (2) of this subsection, if the Special Counsel determines that disciplinary action should be taken against any employee—

(A) after any investigation under this section, or

(B) on the basis of any knowing and willful refusal or failure by an employee to comply with an order of the Merit Systems Protection Board,

the Special Counsel shall prepare a written complaint against the employee containing his determination, together with a statement of supporting facts, and present the complaint and statement to the employee and the Merit Systems Protection Board in accordance with section 1207 of this title.

* * * *

(*l*) The Special Counsel shall not issue any advisory opinion concerning any law, rule, or regulation (other than an advisory opinion concerning chapter 15 or subchapter III of chaper 73 of this title).

Supreme Court, U.S.
FILED
SEP 11 1985
JOSEPH F. SPANIOL, JR.
CLERK

No. 84-[illegible]

In the Supreme Court of the United States

OCTOBER TERM, 1985

NATIONAL TREASURY EMPLOYEES UNION, ET AL.,
PETITIONERS

v.

K. WILLIAM O'CONNOR, SPECIAL COUNSEL,
MERIT SYSTEMS PROTECTION BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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Acting Solicitor General

RICHARD K. WILLARD
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16 pp

QUESTION PRESENTED

Whether the court of appeals correctly held that petitioners' challenge to an advisory opinion issued by the Special Counsel of the Merit Systems Protection Board was not ripe for judicial review.

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In the Supreme Court of the United States

OCTOBER TERM, 1985

No. 84-1925

NATIONAL TREASURY EMPLOYEES UNION, ET AL.,
PETITIONERS

v.

K. WILLIAM O'CONNOR, SPECIAL COUNSEL,
MERIT SYSTEMS PROTECTION BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-28a) is reported at 747 F.2d 748. The memorandum decision of the district court (Pet. App. 33a-57a) is reported at 589 F. Supp. 1551.

JURISDICTION

The judgment of the court of appeals (Pet. App. 31a-32a) was entered on November 2, 1984. A petition for rehearing was denied on February 8, 1985 (Pet. App. 29a). On April 29, 1985, the Chief Justice extended the time for filing a petition for a writ of certiorari to and including June 10, 1985, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. Petitioners are two labor organizations representing federal employees, one of the union's locals, and the local's president. In March 1984, they filed consolidated

actions in the United States District Court for the District of Columbia, seeking to enjoin the Special Counsel of the Merit Systems Protection Board (MSPB) from " 'enforcing' " (Pet. App. 5a) a letter addressing the propriety under the Hatch Act (5 U.S.C. 7321 *et seq.*) of certain voter registration activity and from " 'prosecuting [union members] from [sic] engaging in nonpartisan voter registration * * * activities' " (Pet. App. 35a). The letter was written by a member of the Special Counsel's staff to another union, which is not a party to this suit. The district court denied petitioners' motion for a temporary restraining order because the letter was not addressed to their activities. The court instructed petitioners to seek an opinion from the Special Counsel with respect to the voter registration activities that they were planning to undertake. *Id.* at 4a-5a, 34a-36a.

Petitioners requested an advisory opinion from the Special Counsel on April 2, 1984. Their joint request stated only that the unions " 'have each endorsed a candidate for the presidency in 1984' " and that they " 'are now engaged, through [their] locals and chapters, in nonpartisan voter registration activity,' " during which " 'no attempt is made to solicit registrants on the basis of political party or candidate preference' " (Pet. App. 6a). The letter contained no factual details of any of the unions' particular registration activities. It requested a response within one week. *Ibid.*

The Special Counsel responded four days later, on April 6, 1984 (Pet. App. 59a-67a). His letter noted at the outset that it was "advisory in nature" and that he had "not conducted any investigation into [petitioners'] activity" (*id.* at 60a). The letter also noted "the paucity of information" given in petitioners' request (*id.* at 59a). After discussing the Hatch Act in general terms, the Special Counsel stated, "[t]he determination of whether a voter registration drive is

a political campaign activity must be made from the available evidence" (*id.* at 63a). In the Special Counsel's view, the absence of partisan solicitation at voter registration sites was "only one factor to be considered" (*ibid.*). As "only a partial list" of "[s]ome other relevant factors" that he might take into account, the Special Counsel noted (*id.* at 64a):

> other political activities of the sponsoring organization, the degree to which that organization has become identified with the success or failure of a partisan political candidate, issue or party, the nexus, if any, between the decision to undertake a voter registration drive and the other political objectives of the sponsor, whether particular groups are targeted for registration on the basis of their perceived political preference and the nature of publicity circulated to targets of the drive immediately prior to or during the drive.

Based on these principles, the Special Counsel concluded that the available information "indicate[d] that [petitioners'] voter registration drives have become adjuncts to [their] political campaign activities" (Pet. App. 65a). From this premise, "the ineluctable conclusion must be that those voter registration drives * * * are, in fact, partisan" and therefore prohibited by the Hatch Act (*id.* at 66a). Finally, the Special Counsel noted that federal employees "remain free to participate in truly nonpartisan registration drives" (*id.* at 67a).

b. After receiving this advisory opinion, petitioners amended their complaints to ask that the Special Counsel be enjoined from prosecuting them on the basis of the interpretation of the law set forth in his April 6 letter and that the letter be declared contrary to the First Amendment. On cross-motions for summary judgment, the district court held that petitioners' claims were ripe for adjudication but it ruled in favor of the Special Counsel on the merits (Pet. App. 33a-57a). The case was not premature, the district court concluded, because in its view the advisory letter was

"tantamount to a threat of enforcement" (*id.* at 48a). On the merits, the district court found that "the Special Counsel's analysis [was] entirely appropriate" and that "[petitioners'] position—that their drives are necessarily non-partisan simply because prospective voters are registered without being importuned—* * * ignore[s] the realities of modern political campaigning" (*id.* at 52a).

2. The court of appeals vacated the district court's judgment (Pet. App. 1a-28a) on the ground that petitioners' complaints "fail[] to present concrete claims ripe for court adjudication" (*id.* at 4a). The court of appeals concluded that the case was not ripe for two independent reasons. First, "the advice the Special Counsel is permitted to give creates no law and binds neither the public nor any agency or officer of government" (*id.* at 10a). It is the MSPB, not the Special Counsel, that adjudicates Hatch Act cases, and only the Board can "speak definitively" as to the agency's interpretation of the statute (*id.* at 12a). Not only would judicial review of "nonbinding advisory expositions" of the law be unprecedented (*id.* at 10a; footnote omitted), it would "jeopardize" the Special Counsel's ability to delimit "safe harbors" for federal employees' activity (*id.* at 14a) and would "strip the MSPB" of its authority to adjudicate Hatch Act cases in the first instance (*id.* at 15a).

Even assuming that the Special Counsel could definitively interpret the Hatch Act, the court of appeals concluded that petitioners' case was nonetheless premature because the letter at issue did not represent a realistic threat of enforcement of the Hatch Act against petitioners' members (Pet. App. 16a-19a). Noting the short time that had been available to the Special Counsel to prepare his advisory letter (*id.* at 17a) and the "fact-thin quality of the case" that petitioners presented to him, the court of appeals observed that "[t]he Special Counsel ha[d] confronted no * * * member [of petitioners] with a prosecution threat

should he or she participate in a particular voter registration drive" (*id.* at 18a). Thus, no " 'genuine threat of enforcement' ha[d] been demonstrated here" (*ibid.*).[1]

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Petitioners' claims are factbound, limited as they are to the interpretation to be placed on a single letter written by the Special Counsel in response to the inquiry put to him by petitioners in this case. As the court of appeals noted, petitioners are free "to formulate further, more detailed requests for advice" with respect to particular voter registration activities that they wish to conduct in the future, as to which the Special Counsel "may well reach other conclusions" (Pet. App. 19a). His advice with respect to an election now past, though perhaps not moot,[2] is of little continuing significance. For these reasons, further review is unwarranted.

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[1]Judge Edwards joined the opinion of the court and concurred to make clear his view that the MSPB's administrative adjudicatory authority would not prevent "normal [judicial] adjudication of otherwise properly presented constitutional or statutory claims" (Pet. App. 21a). Judge Mikva dissented on the ground that the Special Counsel's letter did present a realistic threat of prosecution (*id.* at 22a-28a). No judge reached the merits of petitioners' claims.

[2]Petitioners' claims may fit within the exception to the mootness doctrine for controversies that are capable of repetition while evading review, as they argue (Pet. 16-17 n.9). But the resolution of claims resting on particular facts arising during future election campaigns should be made in the context of those circumstances and not on the basis of the stale and "sketchily summarized" (*Public Affairs Assoc., Inc.* v. *Rickover*, 369 U.S. 111, 113 (1962)) facts of the instant case. Regardless of whether the April 6, 1984 letter threatened petitioners with prosecution during the 1984 election campaigns, it cannot reasonably be read as such a threat with respect to future campaigns and voter registration drives, as to which no facts whatsoever were before the Special Counsel.

1. Petitioners' primary argument (Pet. 7-15) is that the Special Counsel's advisory opinion represented a genuine threat of enforcement of the Hatch Act against them and their members. The court of appeals correctly resolved this factual question against them.

Petitioners rely (Pet. 7) on cases such as *Steffel* v. *Thompson*, 415 U.S. 452 (1974), for the proposition that they need not await an actual prosecution to obtain judicial review if they are confronted with a serious threat that they will in fact be prosecuted if they engage in their proposed activities. Accepting this premise and citing *Steffel*, the court of appeals concluded (Pet. App. 18a) that the Special Counsel's letter did not represent such a threat. This conclusion is undoubtedly correct. The letter did not by its terms indicate any intention on the part of the Special Counsel to prosecute petitioners. Nor was the mere issuance of the opinion tantamount to a decision that the Special Counsel would bring a prosecution. As the court of appeals noted (Pet. App. 19a), the Special Counsel has through 1983 never prosecuted more than 13 Hatch Act cases in a single year; in that year, he initiated only two prosecutions despite issuing 4,000 advisory opinions and receiving 86 allegations of violations. Cf. *Ellis* v. *Dyson*, 421 U.S. 426, 434 (1975) (state's enforcement pattern relevant to existence of credible threat of prosecution).[3] The advisory letter in this case was thus hardly sufficient to raise a realistic likelihood of

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[3]Even though petitioners advised the Special Counsel that they had engaged and continued to engage in the general sorts of voter registration drives that the Special Counsel addressed in his letter (Pet. App. 6a), they have not alleged that the Special Counsel has prosecuted their members for those activities; they offer no reason to expect that the Special Counsel would treat their future activities any differently in the exercise of his prosecutorial discretion.

prosecution. See generally *Younger* v. *Harris*, 401 U.S. 37, 42 (1971) ("imaginary or speculative" fears of prosecution insufficient).[4]

The "sweeping generalit[ies]" (Pet. App. 10a) petitioners presented to the Special Counsel and the circumstances surrounding his issuance of the letter support this conclusion. See *United Public Workers* v. *Mitchell*, 330 U.S. 75, 90 (1947) (Hatch Act claims not ripe for review where the Court could "only speculate as to the kinds of political activity the appellants desire[d] to engage in"). Petitioners averred only that they had endorsed presidential candidates and that no partisan solicitation would take place at their registration sites. The Special Counsel, however, stated that a number of other factors would be relevant to his decision in any particular case (Pet. App. 64a). For example, the Special Counsel identified "the nature of publicity circulated to targets of the drive *immediately prior to or during the drive*" as one such factor (*ibid.*; emphasis added). Since the Special Counsel could not be aware of the nature of such publicity in advance of any particular registration drive, it would be unreasonable to conclude that his letter applied across the board to all such drives.[5] Indeed, the letter itself makes clear that "truly nonpartisan registration drives" are permissible (*id.* at 67a). Similarly, the district court noted (*id.* at 55a) that the degree of autonomy of any particular

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[4]The letter's observation that a violation would be shown on certain facts does not change this conclusion. The letter, which was written in only four days "at the behest of parties who held the Special Counsel's feet to the fire of litigation while providing him with few facts," cannot reasonably be regarded "as a product of the agency's considered judgment" or as a firm decision that petitioners would indeed be prosecuted (Pet. App. 16a n.23).

[5]Thus, while the Special Counsel was able to identify certain publicity that would support a conclusion that the drives proposed by petitioners were partisan (Pet. App. 65a-66a), the proximity of those materials to any particular proposed registration drive was not shown.

union local that wished to undertake a registration drive would be relevant to the drive's permissibility under the Hatch Act. That factor as well could not be assessed by the Special Counsel without more specific facts than those provided him by petitioners.[6]

Finally, petitioners were free in 1984 and are free today to return to the Special Counsel with more information regarding any particular registration drive that the unions or their locals wish to conduct. Petitioners' contention that the letter nonetheless seriously threatened their members with prosecution for planned activities that they did not specify to the Special Counsel and with respect to which they could still seek his advice warrants no further review.[7]

2. The court of appeals also correctly determined that review of the Special Counsel's advisory opinion in this case would be inconsistent with the administrative scheme established by Congress in the Civil Service Reform Act of 1978 (CSRA). Cf. *Bush* v. *Lucas*, 462 U.S. 367 (1983) (refusing to imply a *Bivens*-type remedy for federal employees against their supervisors). Under the CSRA, the Special Counsel is empowered to investigate alleged Hatch Act violations and to present them to the MSPB for decision.

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[6]The court of appeals emphasized that union locals were free to raise their particular fact situations before the Special Counsel (Pet. App. 18a, 19a).

[7]The cases on which petitioners rely are inapposite because they present far more immediate threats of prosecution than is apparent here. In *Steffel* v. *Thompson, supra*, for example, the plaintiff "ha[d] been twice warned to stop handbilling" and that if he "disobey[ed] a warning to stop he [would] likely be prosecuted," and a companion who engaged in the same activity had in fact been prosecuted (415 U.S. at 459). Similarly, in *Babbitt* v. *United Farm Workers Nat'l Union*, 442 U.S. 289 (1979), the Court stated that only "credible threat[s] of prosecution" would be sufficient for declaratory relief (*id.* at 298), and it held nonjusticiable claims that depended on particular fact situations that had not yet arisen (*id.* at 304-305).

See 5 U.S.C. 1206(e)(1)(A) and (g)(1). It is solely within the authority of the MSPB to adjudicate Hatch Act violations, and the Special Counsel's views are not binding on the Board. See 5 U.S.C. 1207(a) and (b); *Special Counsel* v. *Biggs*, 1983 Fed. Merit Sys. Rep. 5238 (Aug. 23, 1983). Thus, the Special Counsel's view of the law is in no sense a final agency determination reviewable in federal court. Judicial review of his advisory opinion here, which does not have the "status of law" (*Abbott Laboratories* v. *Gardner*, 387 U.S. 136, 152 (1967)), and "has no effect in and of itself" (*Ewing* v. *Mytinger & Casselberry, Inc.*, 339 U.S. 594, 598 (1950)), would plainly be inappropriate. See, *e.g.*, *FTC* v. *Standard Oil Co.*, 449 U.S. 232, 241-242 (1980) (issuance of complaint not "final agency action" subject to judicial review); cf. *Heckler* v. *Chaney*, No. 83-1878 (Mar. 20, 1985) (agency's decision not to take enforcement action unreviewable). Judicial review at this early stage would prevent the MSPB from exercising its congressionally mandated responsibility authoritatively to interpret the Hatch Act in the first instance. See generally *Whitney Nat'l Bank* v. *Bank of New Orleans & Trust Co.*, 379 U.S. 411, 420-421 (1965) (primary jurisdiction doctrine).

Moreover, judicial review of the Special Counsel's advice to federal employees would, as the court of appeals noted (Pet. App. 14a), undermine his ability to give such advice. Although Congress generally barred the Special Counsel from giving advisory opinions, it expressly excepted Hatch Act inquiries from this prohibition. See 5 U.S.C. 1206(*l*). The availability of this advice helps to dispel whatever chilling effect might otherwise be produced by the Hatch Act. See *United States Civil Service Comm'n* v. *National Ass'n of Letter Carriers*, 413 U.S. 548, 580 (1973).[8] The

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[8]Petitioners' reliance (Pet. 22) on *National Ass'n of Letter Carriers* is unavailing for a number of reasons. First, that case was decided before the enactment of the CSRA and the division of functions between the MSPB and the Special Counsel. Second, the plaintiffs there defined the

court of appeals correctly concluded that "routine surveillance" of the Special Counsel's advice would "hobble [him] in his role as a counselor" (Pet. App. 14a):

> [I]f the Special Counsel could be haled into court every time there was heard a discouraging word from his office, the giving of needed advice would perforce be hampered and might well be paralyzed. Absent some indication that the Special Counsel has metamorphosed from a counsel and constructor of safe harbors into a determined censor of government employees' political activities, judges should not jeopardize [the advisory opinion] process * * *.

Petitioners' attempt to "prevent[] the regular operation of the * * * procedures established by the [CSRA]" (*Abbott Laboratories*, 387 U.S. at 148) was properly rejected by the court of appeals.

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activities that they desired to undertake in a much more specific fashion than here (see 413 U.S. at 551-552 n.3). Finally, the plaintiffs there, unlike here, alleged actual enforcement of the Hatch Act against them (*id.* at 551). *Bantam Books, Inc.* v. *Sullivan*, 372 U.S. 58 (1963), extensively relied on by petitioners (Pet. 18-19), is also inapposite. The state agency there, unlike the Special Counsel, had not simply given legal advice (372 U.S. at 68). Rather, the blacklists of undesirable books that the agency issued "plainly serve[d] as instruments of regulation," and "the Commission itself appear[ed] to have understood its function as the proscribing of objectionable publications, and not merely the giving of legal advice" (*id.* at 69 & n.9). See *Southeastern Promotions, Ltd.* v. *Conrad*, 420 U.S. 546, 557 n.8 (1975) (*Bantam Books* involved system of censorship). Such censorship is wholly absent here.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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REPLY MEMORANDUM FOR THE PETITIONERS

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REPLY MEMORANDUM FOR THE PETITIONERS

We have shown how the divided court of appeals below deviated from numerous decisions of this Court when it decided that the unions' challenge to the constitutionality of an advisory opinion issued by the Special Counsel did not present a controversy ripe for judicial review. The government's opposition to the unions' petition fails to offer any convincing reasons why this Court should not review the court of appeals' decision. In seeking to diminish the importance of this case, the government conspicuously ignores that, as a result of the appeals court's ruling, federal workers across the nation are now effectively barred from exercising their First Amendment right to participate in neutrally conducted voter registra-

tion drives sponsored by NTEU or AFGE or any other union which endorses candidates for office.[1]

1. Attempting to deflect the unions' central argument that the Special Counsel's advisory opinion was ripe for review because it carried a serious threat of enforcement, the government merely amplifies on the appeals court's limited and erroneous treatment of the issue. In so doing, the government miscasts the relevant inquiry for determining whether the Special Counsel's action was justiciable.

As we have noted, the court of appeals misread the teachings of this Court when it indicated that only a direct, explicit threat of Hatch Act prosecution would create a justiciable controversy (Pet. 8; App., *infra*, 18a).[2] The government simply echoes this faulty view when it observes that the Special Counsel's opinion "did not by its terms indicate any intention on the part of the

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[1] The government asserts that the Special Counsel's action has "little continuing significance" because his advisory opinion arose in the context of the 1984 election year (Opposition at 17). It is clear, however, that the Special Counsel's critical conclusion (that neutrally conducted registration drives are "partisan" when the sponsoring union has endorsed candidates for office) stated a principle of general applicability which in no way expired with the 1984 elections. As the dissent below observed, the Special Counsel's interpretation of the Hatch Act "remain[s] the law" (Pet. App. 23a). The unions could hardly reasonably advise their members to ignore it.

[2] Thus, contrary to the government's claim, this case involves fundamental legal error and not merely the resolution of a factual question. Indeed, the court of appeals clearly viewed the issue as a legal one. In rejecting the district court's determination that the Special Counsel's opinion was tantamount to a threat of enforcement, the court of appeals merely substituted its judgment for that of the district court. To the extent the threat of enforcement issue is a question of fact, the court of appeals would have been obliged to rule the district court's finding clearly erroneous—a determination the appeals court, of course, did not make.

Special Counsel to prosecute petitioner." (Opposition at 6).[3]

Such a stringent characterization of the justiciability test set by this Court's "threat of enforcement" decisions is completely unwarranted. For example, *Babbitt* v. *United Farm Workers*, 442 U.S. 289 (1979) made clear that showing a definite intention to prosecute is not a prerequisite of justiciability. The decision makes plain that, in assessing whether a "credible threat of prosecution" exists, the salient question is whether there is a reasonable fear of enforcement. In finding justiciable the plaintiff-union's reasonable fear of prosecution, the Court in *Babbitt* was especially influenced by the fact that the state had "not disavowed any intention of invoking" criminal penalties. 442 U.S. at 302.

When the test of justiciability is thus correctly stated in terms of the reasonableness of the fear of prosecution, it is evident that the Special Counsel's action is subject to review. Here, the fear of prosecution was graphically demonstrated when the unions' federal employee members aborted all of their registration activities upon issuance of the Special Counsel's opinion.[4] The reasonableness of

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[3] Contrary to the government's suggestion, the Special Counsel's listing of various factors that may be considered in deciding whether a registration drive was partisan in no way undercuts the ripeness of the controversy presented by the unions. As the dissent below accurately observed, it does not matter how many factors "might be relevant in some situations" because here the Special Counsel's "evaluation of the drives sponsored by AFGE and NTEU was anything but tentative . . ." (Pet. App. 24a).

Regarding the government's assertions about the infrequency of actual Hatch Act prosecutions, see the union's Petition at 13-15.

[4] In arguing that the Special Counsel's opinion presented no credible threat of enforcement, the government appears to have seriously misapprehended the facts in this case. The government erroneously claims that the unions' members continued to engage in registration activities even after the Special Counsel responded to the unions' inquiry; the government then suggests that the

that fear, as we have explained, can hardly be doubted (see Pet. 10-11). Here, those employees had in hand a letter from the prosecutor of Hatch Act violations, categorically declaring that their participation in the unions' planned registration drives would be illegal. To suggest that, in the face of the Special Counsel's letter, the employees' termination of their registration activities was somehow unreasonable or animated by an unrealistic fear defies common sense, especially when one considers that disregard of the Special Counsel's advice posed a threat to their livelihoods. To reiterate the district court's observation, the Special Counsel gave the unions and their members "no reason to think" that if they proceeded with their planned drives, he would "change his mind about them or not do his duty . . ." as prosecutor of Hatch Act violations (App., *infra*, 46a). Indeed, the situation here is strikingly similar to that found justiciable in *Babbitt*, given the fact that the Special Counsel plainly never "disavowed any intention" of prosecuting the unions' members if they ignored his unmistakable advice. 442 U.S. at 302.

2. The government's effort to distinguish the principal cases, upon which the unions rely, is unavailing. The government claims that *United States Civil Service Commission* v. *National Association of Letter Carriers*, 413 U.S. 548 (1973) is inapposite for three reasons. First, the government asserts that the plaintiffs there were more specific than the unions here in describing the activities in which they wished to engage. This claim is plainly unconvincing in light of the descriptions of planned

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absence of prosecution for *those* activities shows that employees had no reason to fear Hatch Act enforcement proceedings (Opposition at 6, n. 3). The undisputed facts show, however, that in the wake of the Special Counsel's advice, the unions' members aborted all of their planned registration activities (Pet. 10-11; see *e.g.*, NTEU J.A. 49-53, 63). Thus, it is clear that a principal element of the government's argument is based on a mistaken factual premise.

registration activities found in affidavits submitted by the unions to the district court which were considered by the Special Counsel (Pet. 11-12).

Second, the government states that, unlike the unions here, the plaintiffs in *Letter Carriers* "alleged actual enforcement of the Hatch Act against them." (Opposition at 10-11, n.8). A close reading of *Letter Carriers* shows this characterization to be misleading. In *Letter Carriers*, the Court observed that the plaintiffs had alleged that the then-existing Civil Service Commission "was enforcing *or threatening to enforce* . . ." the Hatch Act against them. 413 U.S. at 551 (emphasis added). The Court then set out in a footnote the Letter Carriers' statement as to the activities in which the six individual plaintiffs desired to participate. 413 U.S. at 551-552, n.3. That statement reveals that none of the individuals was actually "the subject of a Civil Service Commission enforcement action." *Joseph* v. *United States Civil Service Commission*, 554 F.2d 1140, 1150, n.17 (D.C. Cir. 1977). In short, the government's suggestion that *Letter Carriers*' justiciability turned on the allegations of actual Hatch Act enforcement is unfounded. The Court made no distinction between the allegations of threatened or actual enforcement. Moreover, the facts there plainly revealed that no actual enforcement was even underway.

Third, the government maintains that *Letter Carriers* is distinguishable because it was decided before the enactment of the Civil Service Reform Act (CSRA), which created the Merit Systems Protection Board and the Special Counsel. That fact is, however, entirely irrelevant to the justiciability question posed here. As we explained in our petition, a determination that this case is ripe for review is in no way inconsistent with the scheme of the CSRA (Pet. 17-20).

Finally, the government unpersuasively tries to rebut the unions' reliance on *Bantam Books, Inc.* v. *Sullivan*,

372 U.S. 58 (1963) on the grounds that the state agency there was, unlike the Special Counsel, not merely giving legal advice but actually functioning as a regulatory body. Of course, this distinction only begs the question. As we have shown (Pet. 18-19), the whole point of our discussion of *Bantam Books* was to illustrate that, like the state agency there, the Special Counsel's issuance operated as more than mere advice; because of his status as the prosecutor of Hatch Act violations, his opinion served to stifle First Amendment activity and thus effectively functioned as an instrument of regulation.

For the reasons stated above and in the petition, it is respectfully submitted that the petition for a writ of certiorari should be granted.

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